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No. 604

IN THE

Supreme Court of the United States

..... TERM, 1963

CIVIL ACTION NO. 24000

FAIR DRAIN TAXATION, INC., a non-profit Michigan Corporation, JAMES J. SOULIGNY and JUANITA A. SOULIGNY, his wife, JOHN DYER-HURDEN and DOLORES DYER-HURDEN, his wife, ZACK D. EVANS and DOROTHY EVANS, his wife, LOUIS J. STAN and JOSEPHINE STAN, his wife, JOHN DURST and DOROTHY DURST, his wife, KARL R. HILDENBRAND and HALINA HILDENBRAND, his wife, THOMAS SYMS and JULIA SYMS, his wife, and W. ROSS JONES and ELIZABETH JONES, his wife,

Plaintiffs,

— vs. —

CITY OF ST. CLAIR SHORES, a Michigan Municipal Corporation, CITY OF ROSEVILLE, a Michigan Municipal Corporation, CITY OF EAST DETROIT, a Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE EIGHT AND ONE-HALF MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE STEPHENS RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE TEN MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE ELEVEN AND ONE-HALF MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE LAKE BOULEVARD RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE FORTIN RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE SOCIA-COUCHEZ RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE MARTIN SANITARY DIVERSION DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE HECHTLER RELIEF DRAIN, a so-called Michigan Corporation, The DRAINAGE BOARD FOR THE MULSO-LIPKE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE TEBO RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE ALEXANDER RELIEF DRAIN, a so-called Michigan Municipal Corporation,

All of which said Drainage Boards, so-called Michigan Municipal Corporations, consist of the following members and parties defendant herein; THOMAS S. WELSH, Macomb County Drain Commissioner and Chairman of each of said Drainage Boards, BERNARD KALAHAR, Chairman of the Macomb County Board of Supervisors and member of each of said Drainage Boards, FRANK BIEHL, Chairman of the Finance Committee of the Macomb County Board of Supervisors and member of each of said Drainage Boards, (as provided in Chapter 20 of the State of Michigan Drain Code of 1956, as amended); The COUNTY OF MACOMB, a public corpration of the State of Michigan, The HONORABLE JOHN C. MACKIE, State Highway Commissioner of the State of Michigan, and The MICHIGAN MUNICIPAL FINANCE COMMISSION, a statutory administrative body,

Defendants.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT

WILSON M. JACKSON, WILLIAM L. SANDERS
Suite 332 Eastland Center Professional Building
Harper Woods 36, Michigan
Attorneys for Plaintiffs and Appellants

Raymond M. Jacobson
Attorney for Appellants
Federal Bar Building
1815 H. Street, N. W.
Washington 6, D. C.

THE INLAND PRESS, DETROIT, MICHIN

INDEX

			Page
1.	(a)	Opinions Below	2
2.	(b)	Supreme Court Jurisdictional Grounds	2
3.	(c)	Questions Presented	3
4.	(d)	Statement of the Case	7
5.	(e)	Statement of Reasons for Plenary Consideration	15
6.	(f)	Matters of Abuse of Discretion by District Court	16
7.	Appendix		19
	(a)	Amended Complaint filed July 8, 1963	19
	(b)	Court's Opinion of July 16, 1963	54
	(c)	Chapter 20 of the Michigan Drain Code of 1956, as amended	63
	(d)	Plaintiff's Motion for Clarification of the Court's Determination	81
	(e)	Supplemental Opinion filed August 5, 1963	87

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ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT

In accordance with Rule 15 of the Rules of the Supreme Court of the United States, the Appellants herewith submit their Jurisdictional Statement as follows:

(a) OPINIONS BELOW

The opinion of July 16, 1963, in this matter has been reported in 219 Federal Supplement 646.

(b) SUPREME COURT JURISDICTIONAL GROUNDS

The grounds on which the jurisdiction of this Court is envoked are as follows:

(1) This is a proceeding for an Injunction against the enforcement of a State Statute, pursuant to Title 28, USC, Sections 2281 and 2284.

(2) Appellants seek a review of the Order Denying Temporary Injunction, filed and entered July 9, 1963, the judgment dismissing the Complaint and Amended Complaint with prejudice and without cost, filed July 9, 1963, the opinion of the Court as filed and entered on July 16, 1963, and the Supplemental Opinion of the Court, filed on August 5, 1963. The Notice of Appeal was filed in this matter on September 4, 1963, with the Clerk of the United States District Court for the Eastern District of Michigan, Southern Division.

(3) The Statutory provision, believed to confer on the Supreme Court of the United States, jurisdiction of this Appeal is 28 USCA, 1253, entitled, "Direct Appeals From Decisions of Three Judge Courts," reading as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an Order granting or denying, after Notice and Hearing, an interlocutory or a permanent Injunction in any Civil

Action, suit or proceedings required by any act of Congress to be heard and determined by a District Court of Three Judges."

(4) The following cases are believed to sustain the jurisdiction: *Van Dyke* vs. *Geary*, 244 U.S. 39, 61 Lawyers Edition 973, 37 Supreme Court 483, affirming 218 Federal 111; *Re: Buder*, 271 U.S. 461, 70 Lawyers Edition 1036, 46 Supreme Court 557; *Clark* vs. *Poor*, 274 U.S. 554, 71 Lawyers Edition 1199, 47 Supreme Court 702, affirming 20 Federal Second 182; *Coleman* vs. *Miller*, 307 U.S. 433, 83 Lawyers Edition 1385, 59 Supreme Court 972, 122 A.L.R. 695.

(5) This matter involves the validity of a Statute of the State of Michigan, to-wit, Chapter 20 of the Drain Code of the State of Michigan of 1956 as amended, being Michigan Compiled Laws Supplement of 1956, Sections 280.461 through 280.490, as amended by Act No. 37 of the Public Acts of 1957, being Sections 11.1461 through Sections 11.1490, Michigan Statutes Annotated, appearing in Volume 8 of Michigan Statutes Annotated on pages 864 through page 877, the text of said Statute being set forth at length in the Appendix herein attached.

(c) QUESTIONS PRESENTED

The questions presented by this Appeal are as follows:

QUESTION 1.

Is the District Court, after announcing its oral opinion that the Court lacks jurisdiction over the issues and the pleadings fail to state a cause of action, and after entry of its formal order entitled, "Judgment Dismissing Complaint and Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted," precluded from filing an

opinion in which the merits of Plaintiffs' Complaint and Amended Complaint are considered?

QUESTION 2.

Do conclusions of law based on the merits of the case, made in an opinion filed after entry of a "Judgment Dismissing Complaint and Amended Complaint" carry the weight of being res adjudicata of the constitutional issues raised in such pleadings?

QUESTION 3.

Can the District Court, in the course of hearings on preliminary argument concerning a temporary injunction and on Defendant's Motion to Dismiss, make rulings and findings of law in an opinion respecting the merits of constitutional issues raised by the Complaint and Amended Complaint, without Plaintiff having been accorded a trial of the case on its merits?

QUESTION 4.

May the District Court, over the objection of Plaintiff's counsel, exercise discretionary authority not contained in Court Rule 56(c) of Federal Rules of Civil Procedures, and proceed with the hearing of Defendant's Motion for Summary Judgment sooner than the ten (10) days notice required by said rule?

QUESTION 5.

Whether or not Plaintiff's Complaint and Amended Complaint, assuming Federal jurisdiction, stated claims upon which relief could be granted?

QUESTION 6.

Whether or not the Plaintiffs were the proper parties entitled to attack the actions of the Legislature of the State of Michigan and the constitutionality of a State Act, to-wit:

Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended?

QUESTION 7.

Whether or not Chapter 20 of the State of Michigan Drain Code of 1956, as amended, is in fact, illegal, void, and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property without due process of law in that a lack of adequate or sufficient notice is given to the property owners in regards to various proceedings under Chapter 20, in which they are entitled to adequate and sufficient notice as set forth in paragraphs 13, 14, 15, 20, 22, and 31 of the Amended Complaint?

QUESTION 8.

Whether or not Chapter 20 of the Drainage Code of the State of Michigan of 1956, as amended, is in fact, illegal, void, and unconstitutional as respects the Plaintiffs and all others similarly situated, in that it constitutes a taking of property, and a denial of equal protection of the law in regards to other citizens, as is set forth in paragraphs 18, 20, 40, and 50 of the Amended Bill of Complaint?

QUESTION 9.

Whether or not Chapter 20 of the Drainage Code of the State of Michigan of 1956, as amended, is in fact, illegal, void, and unconstitutional as respects the Plaintiffs and all others similarly situated, in that it constitutes a taking of property, without due process of law in that an unconstitutional, illegal, and excessive delegation and legislative and judicial powers is granted to the administrative agency (the various Drainage Boards), as set forth in the Amended Bill of Complaint in paragraphs 19, 20, 21, 26, 27, 28, 29, 30, 32, 37, 38, 39 and 40 of the Amended Complaint?

QUESTION 10.

Whether or not Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, is in fact, illegal, void and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property without due process of law in violation of the taxing powers and prohibitions under the Constitution of the State of Michigan as is set forth in paragraphs 21, 22, 24, 25, 34, 35 and 36 of the Amended Complaint?

QUESTION 11.

Whether or not Chapter 20 of the Drain Code of 1956 of the State of Michigan, as amended, is in fact, illegal, void and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property without due process of law in that there is little or no right to challenge the various acts of the Drainage Boards sufficiently to afford adequate protection to the property owners, as set forth in paragraphs 23, 30 and 31 of the Amended Complaint?

QUESTION 12.

Whether or not Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, is in fact, illegal, void and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property without due process of law in that there is a taking of property by virtue of tax money in the lands, in that the act does not relate benefits to areas assessed nor does it charge for the burden cast upon the areas throwing the burden, as shown in paragraphs 33, 42, 43, and 44 of the Amended Complaint?

(d) STATEMENT OF THE CASE

The various Plaintiffs are residents of South Macomb County, Michigan, living respectively in the Cities of St. Clair Shores, East Detroit and Roseville. The City of St. Clair Shores, as a petitioner in all the following instances and sometimes in concert with the City of East Detroit or the City of Roseville, did petition by its governing body, the City Council, for the establishment of county drains, whereby the cost thereof was to be assessed wholly against the public corporation involved, in accordance with Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, being Michigan Statutes Annotated, Sections No. 11.1461 through Sections 11.1490, and being Michigan Compiled Law Supplement of 1956, Sections 280.461 through 280.490, as amended by Act No. 37 of the Public Acts of 1957. In accordance therewith the fourteen (14) drainage districts were thereby established, most of which have been completed except for the Alexander Relief Drain. On June 9, 1963, the Plaintiffs filed the Complaint in the Instant Cause, which was succeeded by the Amended Complaint covering substantially the same material on July 8, 1963. A short summarization of the claims of the Plaintiffs as set forth in the Amended Complaint are as follows:

> (1) Plaintiffs are residents, property owners and taxpayers in the Cities of St. Clair Shores, East Detroit and Roseville, County of Macomb, State of Michigan, and bring this suit on their behalf and as a class action on behalf of all taxpayers and property owners similarly situated in the three (3) Defendant-Cities. (Paragraph 2 of the Amended Complaint.)
>
> (2) The Defendant-Cities, County of Macomb, Highway Commissioner and Municipal Finance Com-

mission are identified in paragraphs 3, 4 and 5 of the Amended Complaint.

(3) Plaintiffs are further identified as persons entitled to due process of law and equal protection of law in all dealings affecting their property as guaranteed by the Fourteenth Amendment of the United States Constitution. (Paragraph 12 of the Amended Complaint).

(4) All of the Defendant drainage boards were created by Chapter 20 of the Drain Code of 1956 of the State of Michigan upon petition of the various cities, and have no powers or existence except by Chapter 20, and that the cost of the projects of these various drainage boards will exceed Fifty Million ($50,000,000.00) Dollars. (Paragraph 8 of the Amended Complaint).

(5) The various drainage boards under Chapter 20 apportions the costs of the drains and levies assessments therefore upon the Defendant municipalities and the other public corporations involved. (Paragraph 8 of the Amended Complaint).

(6) In turn the Defendant-Cities look to the real estate property owners and the real property in their respective municipalities to receive the monies for which to pay the cost of the drain assessed against the City. (Paragraphs 9, 10, and 11 of the Amended Complaint).

(7) If the assessments are not paid by the property owners to the municipality, it can and will result in a forfeiture of the land by the property owner to the municipality for the non-payment, even though no

benefits are received by the particular land nor no burdens causing the need for the drain are created by the particular land. (Paragraphs 9, 10, and 11 of the Amended Complaint).

(8) If Chapter 20 is invalid and unconstitutional, the money collected thereunder from these property owners, will have been collected illegally and in violation of their civil rights. (Paragraphs 9, 10 and 11 of the Amended Complaint).

(9) Chapter 20 is in fact, illegal, void and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property,

(a) without due process of law in that a lack of adequate or sufficient notice is given to property owners in regards to various proceedings under Chapter 20 in which they are entitled to adequate and sufficient notice. (Paragraphs 13, 14, 15, 20, 22, and 31 of the Amended Complaint).

(b) denying equal protection of the law in regards to other citizens. (Paragraphs 18, 20, 40 and 50 of the Amended Complaint).

(c) without due process of law in that an unconstitutional, illegal and excessive delegation of legislative and judicial powers in violation of the constitutional doctrine of Separation of Powers is granted to this administrative agency. (Paragraphs 19, 20, 21, 26, 27, 28, 29, 30, 32, 37, 38 and 39 of the Amended Complaint).

(d) without due process of law in violation of the

taxing powers and prohibitions under the Constitution of the State of Michigan. (Paragraphs 21, 22, 24, 25, 34, 35 and 36 of the Amended Complaint).

(e) without due process of law in that there is little or no right to challenge the various acts of the drainage boards sufficiently to afford adequate protection to the property owners. (Paragraphs 23, 30, and 31 of the Amended Complaint).

(f) without due process of law in that there is a taking of the property by virtue of tax money and the lands in that the act does not relate benefits to areas assessed nor does it charge for the burden cast upon the areas throwing the burden. (Paragraphs 33, 42, 43 and 44 of the Amended Complaint).

(10) The action in this case is timely since very little of the tax funds have been pledged or the moneys assessed for the majority of these drains and most of the beginning procedures under Chapter 20 as to all of these drains are just beginning and everything done under the act affects vitally the property and property rights of the Plaintiffs and the rest of the members of their class. (Paragraphs 51 and 52 of the Amended Complaint).

(11) The harm to be done to the property and the property rights of these individuals showing the great need for the restraint of equity is spelled out in paragraphs 51 and 52, before further lasting, irreparable, conclusive, and irretrievable harm is done.

(12) The Defendant, Michigan Municipal Finance Commission, is a necessary party in that it contributes to the harm being done, in that it has sanctioned the bonds so far issued under Chapter 20 and can sanction the rest of the bonds to be issued under this Chapter with the full faith and credit of the State of Michigan and of the various Defendant municipalities herein, and as such these bonds being tainted with unconstitutionality will travel, and do travel, in inter-state commerce and cast a burden thereon, and as such will be a fraud on the people outside of the State of Michigan in inter-state commerce who purchased these bonds, and as such their ultimate recourse under the statutes and acts of Michigan will be to the taxpayers of these various municipalities by virtue of Chapter 20. (Paragraphs 45, 46, 47, 48, 49 and 50 of the Amended Complaint).

The relief prayed for by the Plaintiffs can be summarized as follows:

(1) A declaratory judgment that all of the provisions of Chapter 20 of the Drain Code of the State of Michigan of 1956 are unconstitutional and void as being a denial and violation of the Fourteenth Amendment of the Constitution of the United States and of various provisions of the Michigan Constitution and that the Defendant drainage boards themselves be declared unconstitutional.

(2) For relief, equitable in nature restraining the Defendants, and each of them, from taking any further proceedings or actions under the provisions of

Chapter 20 of the Drain Code of 1956, and further mandatorily requiring the return and refund to Plaintiffs and others similarly situated of all sums paid and collected under Chapter 20 that can be attributed to Plaintiffs.

(3) That all contracts and agreements entered into by the Defendant drainage boards be declared illegal, null and void, and that the various Defendant-Cities be enjoined from transferring funds or credits on account of the Defendant drainage boards and for Defendant-Cities to impound all monies collected for Chapter 20.

(4) That this Court adjudicate each and every constitutional issue raised in this case, and that a three (3) man Court be empaneled to hear the matters in this suit.

(5) That the Court grant such other and further relief in the premises as shall be agreeable to equity and good conscience.

At the Show Cause hearing as to whether the Preliminary Injunction should issue, held on June 25, 1963, the Court speaking through Judge Clifford O'Sullivan of the Circuit Court of Appeals, denied the Preliminary Injunction holding that there was a plain speedy remedy in the State Court and expressed great doubts as to whether or not the District Court had jurisdiction and further was doubtful whether the Complaint stated a cause of action for equitable relief. The Court said it would entertain a Motion to Dismiss and that the earliest hearing available for such a Motion would be July 9, 1963, should the Defendants bring such a Motion.

On July 1, 1963, the Defendant City of St. Clair Shores,

the Defendant drainage boards and their members filed their Motion to Dismiss for failure to state a claim upon which relief can be granted and served Plaintiff's Counsel with a copy thereof. On July 8, 1963, Plaintiff's statement in opposition to Motion to Dismiss was filed, Plaintiff's stating therein that they proceeded on the assumption that the Motion was filed strictly under Federal Rules of Civil Procedure No. 12(B)(6), since any other interpretation would have entitled Plaintiffs to at least ten (10) days service of said Motion before the time fixed for hearing, the Motion by the Defendant City and others being served on July 1, 1963, with the date of hearing set for July 9, 1963, not giving the Plaintiffs the ten (10) days as required under Rule 56. Plaintiffs further stated that since it was a Motion to Dismiss a pleading, and it is will settled in an American law that a Motion to Dismiss a pleading admits for the purpose of the Motion the truth of all facts well pleaded in the pleading attack and in the instances fairly deducible therefrom that the Motion in question had to be construed in the light of the Complaint or the Amended Complaint admitting the truth of all the facts well pleaded therein and any instances fairly deducible therefrom.

At the hearing held July 9, 1963, the statement of Plaintiffs as to time was reiterated by Counsel, but the Court held that they were not going to be bound in this instance by Rule 12 (b)(6), since Plaintiffs had begun the case and should have been prepared, even though they had not been afforded the ten (10) days time.

Lengthy arguments then were held upon the Motion to Dismiss for failure to state a claim upon which relief can be granted and the statement in opposition to said Motion, filed by Plaintiffs, upon the conclusion of which the Court

through the Honorable Clifford O'Sullivan, Circuit Judge, made a statement for the records, a portion of which statement is:

> "We think, therefore, without awaiting the writing of a formal opinion or memorandum that we should announce at this time our disposition of the case before us . . .
>
> "We will, upon presentation to us, of an Order to that effect dismiss the original, as well as the Amended Complaint, both on our motion and upon the motion to dismiss that has been filed by the Defendants.
>
> "We will further expose our views in a memorandum that may be filed as quickly as it can be done, but we do at this time announce our holding substantially as follows:
>
> "We find that both the original and the Amended Complaint before us do not, either of them, state a cause of action, in the jurisdiction of the Court nor do we state a cause of action."

At no time was anything else before the Court other than the original hearing on whether or not the Temporary Injunction should issue and the second Motion to Dismiss for failure to state a claim upon which relief could be founded. At no time was a hearing or trial on the merits of any of the issues in the cases as to the unconstitutionality of Chapter 20 held. Immediately after the Court's statement on July 9, 1963, an Order was entered reading as follows:

> "That the said Complaint and the Amended Complaint be, and the same are dismissed for failure to state a claim upon which relief can be granted, with prejudice and with no costs."

On July 16, 1963, the Court filed its written opinion giving reasons supposedly for the finding and Order of the Court on July 9, 1963.

On July 25, 1963, Plaintiffs filed a "Motion for Clarification of the Court's Determination", stating therein that they did not know whether the Court dismissed the cause because of lack of jurisdiction or on the merits and stating therein further that if the cause was dismissed for lack of jurisdiction, then there was nothing to decide on the merits. On August 5, 1963, the Court filed its supplemental opinion, the last paragraph thereof which reads as follows:

> "Having fully considered the Plaintiff's Motion for Clarification, this Court reaffirms its Order of Dismissal and Opinion, determining that the Complaint and Amended Complaint are dismissed on their merits for failure to state a claim upon which relief can be granted."

Plaintiffs thereupon began the instant Appeal by filing on September 5, 1963, their "Notice of Appeal to the Supreme Court of the United States".

(e) STATEMENT OF REASONS FOR PLENARY CONSIDERATION

A statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, is as follows:

1. Should the opinion and decision of the Lower Court be allowed to stand in this case upholding the constitutionality of Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, and giving the effect of res adjudicata to that decision, then irreparable harm will be done to Plaintiff and countless other citizens of the State

of Michigan who then will be forever precluding from having a hearing on the merits as to the constitutionality of this statute and will further be deprived of due process of law by the fact that they will no longer be able to challenge the act, but instead be bound by it and subject their properties to loss because of it.

2. The questions presented are substantial in that they cut across the whole body of American Law on the constitutional questions of the doctrine of separation of powers and the powers that may be delegated to a quasi-judicial-quasi-legislative administrative authority and to the extent that powers may be freely and wholesalely granted without any consideration of the rights of the individual citizen to protest or to be heard except in the most perfunctory manner. There is a growing tendency today that if allowed to go unchecked will result in the taking away of the fundamental provisions of the Bill of Rights regarding property and the citizen's rights to the peaceful enjoyment of his property. This is the tendency of big government to become even bigger and in the process, constricting your individual citizen to the role of a helpless by-stander on the road of so-called municipal and state progress, neither giving to the individual notification of the right to be heard nor the right to be heard in matters affecting his property rights as supposedly expressly protected by the United States Constitution.

(f) MATTERS OF ABUSE OF DISCRETION BY DISTRICT COURT

The matters in which it is contended that the District Court has abused its discretion are as follows:

1. In arbitrarily deciding that the Constitutional questions as posed by the Complaint and restated in the Amend-

ed Complaint and as restated in the Statement of this case above were not sufficient grounds for issuing a Temporary Injunction restraining the various Defendants from proceeding further with any acts or actions under Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, even though in the absence of such restraint Plaintiff property owners and all others similarly situated would be liable for the payment of the enormous sums of money pledged and levied by or through the various Defendants which sums should Chapter 20 be proven unconstitutional need not have been levied or spent at all should Plaintiffs prevail.

2. The opinion of the Lower Court upholding the constitutionality of Chapter 20 of the Drainage Code of the State of Michigan of 1956, as amended, was rendered by the Court upon a Motion to Dismiss for lack of jurisdiction. At no time was the Plaintiff afforded an opportunity to present his case on the merits and the decision thus rendered is rendered by the Court predicated upon the briefs submitted and filed in this case three (3) days prior to the date of hearing and which no opportunity was presented or afforded for an answering brief to be filed and consequently the opinion of the County is one-sided, prejudiced based upon inaccuracies and misstatements of the law.

3. The Court abused its discretion in arbitrarily deciding that the provisions of Federal Rules of Civil Procedure No. 12(b)(6) were discretionary when, in fact, the provisions of said rules are mandatory in the allowance time for the preparation of the opposition's pleadings, and in particular, in the requirement of the giving of a ten (10) day notice as required under the provisions of Rule 56.

4. In deciding on July 9, 1963, that the "Amended Complaint before us do not, either of them, state a cause of action, in the jurisdiction of the Court", and then one (1) week later filing an opinion in which a decision on the merits is handed down, because if the Court had no jurisdiction it could not render a decision on the merits.

5. In arbitrarily deciding those constitutional issues favored by the Defendants to be decided and which the Defendants claim are res adjudicata, rather than deciding all of the constitutional questions as validly raised by both the Complaint and the Amended Complaint, providing of course, that they had original jurisdiction to begin with.

WILSON M. JACKSON
WILLIAM L. SANDERS
Suite 332, Eastland Center
Professional Building
Harper Woods 36, Michigan,
Attorneys for Plaintiffs and
Appellants.

APPENDIX

AMENDED COMPLAINT

Now comes the plaintiffs by their attorneys, Wilson M. Jackson and William L. Sanders, and for their Amended Complaint in this matter amend the same by first adding as party plaintiffs, all of the parties listed on plaintiffs' Exhibit I hereto attached, and including all the persons named in Paragraphs A, B and C thereof, and further amend said Complaint showing unto the Honorable Court said Complaint as amended as follows:

1. This action arises under the Fourteenth Amendment to the Constitution of the United States of America, and the "DUE PROCESS OF LAW" and "EQUAL PROTECTION OF LAW" clauses thereof; the Constitution of the United States of America, Article IV, Section 1; the Constitution of the United States of America, Article I, Section 8 (3), as hereinafter more fully appears. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

2. The Plaintiff, FAIR DRAIN TAXATION, INC., is a Michigan non-profit corporation, with its registered office in the City of St. Clair Shores, County of Macomb, State of Michigan, and was formed by residents, taxpayers, and property owners of the City of St. Clair Shores for the purpose of contesting drainage law legislation and of lobbying to improve the drain laws of the State of Michigan. The Plaintiffs, JAMES J. SOULIGNY, JUANITA A. SOULIGNY, his wife, JOHN DYER-HURDEN, DOLORES DYER-HURDEN, his wife, ZACK D. EVANS, DOROTHY EVANS, his wife, LOUIS J. STAN, JOSEPHINE STAN, his wife, JOHN DURST, DOROTHY DURST, his wife, KARL R. HILDENBRAND, HALINA

HILDENBRAND, his wife, THOMAS SYMS, JULIA SYMS, his wife, W. ROSS JONES, and ELIZABETH JONES, his wife, are residents, property owners, and taxpayers of the City of St. Clair Shores, County of Macomb, State of Michigan, and all of said Plaintiffs are bringing this suit on behalf of all taxpayers and property owners similarly situated, not limiting said property owners or taxpayers to those who live only in the City of St. Clair Shores, but including all others in like circumstances in the Cities of East Detroit and Roseville, together with additional parties plaintiff as enumerated in annexed Plaintiffs' Exhibit I.

3. The Defendant CITIES OF ST. CLAIR SHORES, EAST DETROIT, and ROSEVILLE are Michigan municipal corporations, situated in the southern area of the Defendant COUNTY OF MACOMB, a Michigan body politic, of which THOMAS S. WELSH is its duly elected County Drain Commissioner, BERNARD KALAHAR is the Chairman of its Board of Supervisors, and FRANK BIEHL is Chairman of the Finance Committee of said County Board of Supervisors.

4. The Defendant Honorable JOHN C. MACKIE is the duly elected State Highway Commissioner of the State of Michigan, and a constitutional officer by virtue of the provisions of the Michigan Constitution of 1908.

5. The Defendant MICHIGAN MUNICIPAL FINANCE COMMISSION is a statutory Michigan commission, created by Act 202 of the Public Acts of 1943, as amended, the members thereof being the State Treasurer, the Attorney General, the Auditor General, and the Superintendent of Public Instruction, each of whom may act under any and all circumstances through his deputy, and whose powers

and duties include advising municipalities and protecting the credit of state and municipalities to the extent of inspecting municipal records, requiring statements, examining witnesses, and giving approval to the pledging of the faith and credit of any of the municipalities or of the state, as further spelled out in said statute.

6. All of the Drainage Board Defendants came into existence since 1957, by virtue of the aforementioned Chapter 20 of the State of Michigan Drain Code of 1956, as amended, and are so-called Michigan municipal corporations by definition of the Finance Act hereinbefore referred to, and each of said Drainage Boards is composed of THOMAS S. WELSH, BERNARD KALAHAR, and FRANK BIEHL, because of their Macomb County offices, as stated in Paragraph 3 hereof, as Chairman and the members thereof respectively.

7. Each of said Drainage Boards was established by petition, filed either in pursuance of Section 463 or Section 486 of said Act, by the City of St. Clair Shores as the originating petitioner, and at times in concert with either the City of East Detroit or the City of Roseville, or both, or in its sole and individual capacity at other times, but at all times as a resolution of the governing body of each of the signatory cities, for the purpose of establishing county drains necessary for the public health, whereby the cost thereof is to be assessed wholly against public corporations.

8. Plaintiffs are informed, and have reason to believe it to be so, that the cost of all of the aforementioned drains will exceed the sum of FIFTY MILLION ($50,000,000.00) DOLLARS, and that said costs as to some of the drains will be apportioned between various municipalities, but that, as to all of the drains, the City of St. Clair Shores

will bear the substantial burden for the payment of each, as will the County of Macomb and the State Highway Commissioner and his Department.

9. In turn the municipalities where they are assessed or levied by the various drainage boards have no place to look for their share of the moneys but to the individual taxpayer, the owner of real estate within their respective community. Regardless of which of the two methods of collection against the taxpayer the use as provided in Section 490 of the Act, the tax assessed or levied by the City becomes a levy against the property of the individual taxpayer.

10. As to each taxpayer so levied and assessed and our plaintiffs have been so levied and assessed, if the payments are not made, the result will be a forfeiture of the land by the property owner and taxpayer for the non payment, even though no benefits are received by the particular land nor no burdens causing the need for the drain are created by the particular land.

11. If in the final analysis Chapter 20 turns out to be invalid and unconstitutional, the money collected thereunder from these property owners, including our Plaintiffs, will have been collected illegally and in violation of their civil rights with no hope for the return of the same and any property forfeited thereunder will have been lost completely.

12. Plaintiffs, as such taxpayers and property owners, and all other taxpayers and property owners similarly situated in these three aforesaid cities, are persons entitled to due process of law and equal protection of the laws in all dealings affecting their property, as guaranteed by the Fourteenth Amendment of the United States Constitution.

13. That while Sections 467 and 469 of said Chapter 20 of the Drain Code of 1956, recognize the constitutional right of taxpayers in Plaintiffs position to be heard, both as to the first meeting to hear any objections to the proposed drains and the petition therefor, and to the matter of assessing the cost of such drains to the designated public corporations as provided for in Section 467, and then again, to object to the apportionments made by the Drainage Boards after the tentative apportionments of costs have been made, as provided for in Section 469, however, after recognizing the right of the taxpayer to be heard on both of these sections, neither section nor any place else in said Chapter 20, is provision made for the taxpayer to receive notice reasonably calculated to apprise him of the pendency of these actions and of his right to present his objections at such hearing, such failure to provide for notice being a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States and hence, rendered proceedings under said Chapter 20 of the Drain Code of 1956 void and unconstitutional.

14. Plaintiffs in fact as residents of the various municipalities herein involved, to-wit: the Cities of St. Clair Shores, East Detroit, and Roseville, have in fact, received no individual notice by mail or otherwise reasonably calculated to apprise them of the pendency of these actions and of their right to present their objections at any such hearings.

15. That even if said sections of the Drain Code did provide adequate notice to apprise the taxpayers of their right to appear and be heard at the aforesaid two hearings provided for in Sections 467 and 469, the taxpayers still would not know whether or not they would be within the group to be assessed, since the matter of levying against

individual taxpayers, under said Chapter 20, is the very last act contemplated to be done, provision therefor being made in Section 490 of said Chapter 20; said Section 490 providing that after all the assessments and apportionments have been made against the individual municipalities and the amounts determined as between the municipalities and the tentative cost of the entire project being determined as against the municipalities, *then, and only then,* shall the municipality determine which of two methods it shall use in assessing its individual taxpayers, having the option to:

A. Proceed by a general levy against all of the property within the municipality; or

B. Establish a special assessment district and decree that only those taxpayers whose property falls within that special assessment district shall be liable for the cost.

That therefore, the taxpayer, even if he had adequate notice of the hearing, still would not know if it applied to him, since he would not know whether or not he would be liable so that he could exercise his right to be heard and object; that taxpayers' liability under these sections is not established until all of the procedural matters have been accomplished, the amounts levied, and everything else contemplated to be done by a drainage board in the letting of contracts and financing of a drain have been finished, all of which constitutes a denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and therefore, further renders Chapter 20 of the Drain Code of 1956, as amended, unconstitutional.

16. In fact, Plaintiffs as taxpayers of the three cities involved, to-wit: St. Clair Shores, East Detroit, and Rose-

ville, have received no notice at any time as to the method of assessment adopted by their particular municipality nor has it been possible for the municipality to notify the individual taxpayers by virtue of Section 490 as spelled out in Paragraph 15 hereof, in time for the taxpayer to appear at the first hearing on objections to apportionment or at the hearing on the final order of determination or the final order of apportionment since at the time of these hearings neither the taxpayer nor the municipality knows that the taxpayer is in the class of persons to be assessed.

17. As a result thereof, determinations are being made which can and do result to the individual taxpayer and have resulted to the individual taxpayer in the deprivation of his property through a denial of due process of law in violation of the Fourteenth Amendment of the United States Constitution.

18. That by the method of municipal assessment as provided for in Chapter 20 of said Drain Act, which has the municipality filtering down the actual assessment to the taxpayer at large as a general tax, said act violates the provisions of the Fourteenth Amendment of the United States Constitution, and the equal protection of the law clause thereof, in that one taxpayer living in one municipality may be residing across the road from a taxpayer in an adjoining or contiguous municipality, which in fact, is the case in actual existing situations, as for example a taxpayer living in municipality A, for instance, the City of St. Clair Shores, will be paying a larger amount of tax than the taxpayer living in Municipality B, in this case the City of Roseville, even though both taxpayers contribute the same amount to the burden and receive the same benefit from the proposed drain; Municipal apportionment under

Chapter 20, which completely fails to take into account the rights of the individual taxpayer or in his property.

19. That Chapter 20 aforesaid fails entirely in its framework to set up the preliminary steps, standards, guides, and controls necessary for a municipality to be taken in holding public hearings regarding the adequacy and necessity of drains in order to provide the governing body of a municipality with a basis of authority and a proper determination to proceed with the preparation and filing of a petition, as authorized by Sections 462 and 463 of said Chapter 20; that the absence of such preliminary protection provisions in said sections deny and deprive Plaintiffs and others in interest of due process of law and equal protection as intended under the Fourteenth Amendments to the United States Constitution and Article II, Section 16, of the Constitution of the State of Michigan.

20. That the arbitrary filing of a petition with the Drain Commission by a municipality under the authority complained of in Sections 462 and 463 of Chapter 20 aforesaid, without the safeguards constitutionally required to insure exercise of due process and equal protection to individual taxpayers, involuntarily, without notice, without hearing, and without opportunity to consider proofs of necessity, wrongfully commits Plaintiffs and others in the same class to assume vast tax obligations for new drains, without any indication of the cost thereof to either the municipality or the taxpayer for upwards of thirty years, and therefore is an abrogation of constitutional guarantees denying the taxpayers and Plaintiffs due process and equal protection as aforesaid;

21. Plaintiffs further allege that by the denial of due process of law guaranteed to them under the Fourteenth

Amendment of the Federal Constitution, drainage boards created by said Sections 464 of Chapter 20 abrogate taxpayers' rights to due process of law to approve or reject the action of Defendant municipalities to petition for drain construction and also to tax beyond the constitutional limitation of fifteen (15) mills, as provided by Article X, Section 21, of the Michigan Constitution of 1908; that the abrogation of constitutional rights herein complained of arises directly from the arbitrary power vested by Section 463, Chapter 20, which in effect permits a municipality to appoint the Drain Commission, its irrevocable agent, and to delegate to its Drainage Boards infinitum irrevocable authority tantamount to permanent, supreme, final power to adjudge necessity, levy assessment by apportionment of cost, contract and obligate itself for expenditure of vast sums of money to be levied and collected by the municipality and other public corporations affected, and to enter into securities financing, borrow money in anticipation of collections, and generally to be the unbridled, irrevocable agent of the municipality or other public corporations affected without any chance to recall the petition filed; that such unrestricted administrative discretion is greater and broader than charter or statutory powers possessed by such municipal and public corporations, and that by said appointment and delegation complained of as unconstitutional, such municipal and public corporations are reduced to captive victims of the several drainage boards without limitation as to time or cost;

22. Plaintiffs further allege and charge the fact to be that the legislative device complained of in Paragraph 21 above is unconstitutional, both under Michigan and United States Constitutions, in that under Chapter 20, aforesaid, due process is denied to taxpayers ultimately to be burdened

with the cost of the drains ordered, by the devious procedure to accomplish indirectly without notice or mere gesture of notice an objective that may be rejected directly if put to electors, and thus is not due process, and amounts to a studied avoidance to deny taxpayers rights, with the consequent injury and harm to said taxpayers over the original thirty (30) year period contemplated necessary to permit collection of taxes in an amount sufficient to meet the principal and interest required on the proposed bonds; that as such it is confiscatory and an abrogation of the constitutional rights guaranteed under both Federal and State Constitutions.

23. That proceedings by certiorari for review as provided in Section 483 of said Chapter 20 are wholly inadequate since mere compliance with other sections of said Chapter 20 by the drainage boards has the effect of stamping all proceedings as regular, without consideration of constitutional guarantees, which Plaintiffs herein claim to be missing and which, in fact, render the whole of Chapter 20 inadequate, unconstitutional, and a denial of due process of law as to Plaintiffs and all other taxpayers similarly situated, and particularly, since taxpayers do not have adequate notice of the hearings which toll the running of the time to seek the limited review provided.

24. That provisions of Chapter 20 of said Drain Code, calling for the spreading of a drain assessment as to a particular municipality upon the books of the city as a whole, and the taxing thereby of all of the taxpayers by means of general taxation, does create under general tax limitations called for by the charters of these respective municipalities, an illegal burden in that it far exceeds the millage limitation called for either in the charter of these municipalities or by the constitution of the State of Michigan, of 1908, as amended and are unconstitutional therefor.

25. That Sections 475 of Chapter 20 of the Drain Code of 1956, violates said Article X, Section 21 of the Michigan Constitution of 1908, in that it specifically and arbitrarily, without any right or justification under law or by any logical reasoning, provides for the total disregard of the constitutional limitation on the power of taxation which in said constitutional limitation is restricted to a maximum of 15 mills for all taxes assessed, "for all purposes", unless certain alternative procedures designed to give notice to taxpayers are followed by election to secure their approval; that by said Section 475 the Legislature of the State of Michigan has attempted arbitrarily to amend the Constitution of the State of Michigan, which it has no right to do, unless it submits the same to a referendum vote of all the people, which was not done; that all of the above constitutes to your Plaintiffs and all other taxpayers similarly situated, a denial of due process of law in the taking of their property, and a complete abrogation of fundamental property rights that inure to them as taxpayers and citizens under the Federal Constitution;

26. That Section 467 of said Chapter 20 of the Drain Code of 1956, as amended, is unconstitutional as a denial of due process of law in that it is arbitrary, confiscatory, and an unconstitutional delegation of judicial and legislative powers to an administrative board, without any safeguards or controls or guides to aid the board in arriving at its determinations in that:

A. No standards are set up or guideline established for this administrative board to guide in it making its tentative determination as to the sufficiency of the petitions;

B. No guidelines or standards are set up to determine the practicability of the proposed drains;

C. No guidelines are set up to make a tentative determination of the public corporations to be assessed: and

D. No provision is made for any determination as to the benefits or burdens cast upon the proposed drain by the various individual properties owned by the individual property owners, who will ultimately pay the same.

27. That Section 468, of Chapter 20 of the Drain Code of 1956, is unconstitutional and a denial of due process of law as to Plaintiffs and all others similarly situated, in that it violates the doctrine of separation of powers in allowing arbitrary judgment to be made by the drainage board in a quasi-judicial and quasi-legislative capacity, without any standards or guidelines to enable it to determine the same, in the following respects:

A. The drainage board is to select the route of the drain, but arbitrarily, the drainage board is not limited to the route of the drain as described in petition, but may determine in whichever direction it wishes said route to proceed.

B. No standards or guidelines are established for the Board to determine the percentage of the cost of each drain, to be borne by each public corporation, but rather, just a vague statement:

> "There shall be taken into consideration the benefits to accrue to each public corporation, and also to the extent that each public corporation contributes to the condition which makes the drain necessary."

as the only guideline provided in determining the proportion of costs as between the public corporations.

C. No determination is to be made whatsoever by the Board in this section or any other section as to the benefits to accrue to each individual taxpayer, or as to the extent that each individual taxpayer contributes to the condition which makes the drain necessary.

28. That Section 369, of said Chapter 20 of the Drain Code of 1956, is unconstitutional and constitutes a denial of due process of law in that it is arbitrary, confiscatory, and in violation of the doctrine of separation of powers under Article IV Sections 1 and 2 of the Michigan Constitution of 1908 as to these property owners and taxpayers who are Plaintiffs herein, in that it unlawfully and illegally delegates judicial and legislative functions to an administrative body without any standards or guidelines for the exercise of such judicial or legislative discretion, in the following respects:

A. Without any standards or guidelines being established, the Drainage Board may confirm the apportionments it has previously arbitrarily established or may readjust the same without any means other than the word "inequitable" of determining whether the same shall be adjusted or reapportioned or granted as they stand.

B. That although the public corporations to be assessed or taxpayers may be present at such hearing, the Board may arbitrarily without giving its reasons therefor, completely ignore the suggestions of the taxpayers or the public corporations to be assessed,

and arbitrarily establish what figures these apportionments shall be in the percentages of apportionments, without any recourse to any guidelines or set standards in determining the same, except the word "inequitable."

29. Section 471, of said drain code, is unconstitutional and a denial of due process of law, and is in violation of the doctrine of separation of powers as provided for in Michigan Constitution of 1908, Article IV, Sections 1 and 2, in that drainage boards are given unlimited contractual powers, with the right to select, arbitrarily, the persons with whom it wishes to contract, the persons to whom it wishes to award any contract, the subject matter of any contract, or with anyone else in any respect and in any manner it sees fit relative to the construction and maintenance of any drain, without any guidelines or standards to determine, or aid it to any standards set up as to the manner of contracting, in whole or in part, the work for this project, or without any limitations or standards or guidelines as to the prices to be paid, the bids to be selected, or any need to select the lowest bid or a bid in conformity with any standard whatsoever, although said section does call for bids, but with no standards or guidelines to aid the Drainage Board in deciding just what type or kind of bid it shall take, nor with any standards or guidelines limiting it to the best bid, the lowest bid, or any other bid;

30. That Section 471, of Chapter 20 of the Drain Code of 1956, is arbitrary, confiscatory, and unreasonable as a denial of due process of law in relation to these property owners, taxpayers, and plaintiffs and others similarly situated, in that although the drainage board may require the County Treasurer to be accountable for all moneys belong-

ing to the Drainage District; that nowhere in said section nor anywhere else in said Act is there any accountability placed upon drainage boards themselves, or any member thereof, nor is there any limitation placed upon any expenditure by the drainage board, nor is there any requirement upon drainage boards to account or inform taxpayers as to moneys received and moneys expended, work in process or completed and balances remaining on hand for each drainage board created;

31. That Section 473 of said Chapter 20, constitutes an unconstitutional denial of due process of law, and is arbitrary and confiscatory in that it vests drainage boards with the power to establish special assessment rolls against the various several public corporations, but fails to take into consideration the preparation of such special assessment rolls against ultimate taxpayers, residing within these several public corporations; nor does it establish apportionment districts based on benefits to be received or burdens to be created upon the area to be drained, and thus does not afford taxpayers any idea of the prospective amount to be borne individually;

32. That as to these Plaintiffs and all other property owners similarly situated, Section 475, of Chapter 20 of the Drain Code of 1956, is unconstitutional as a violation of due process of law in that it constitutes an arbitrary and confiscatory grant of legislative power in allowing the drainage boards to levy taxes, the levying of taxes being a legislative function; that further it is arbitrary and confiscatory as an illegal grant of legislative power in allowing drainage boards to impose taxes without any standards to guide the drainage boards in the establishment of such taxes without limitations as to the amount to be collected

or assessed; that in fact allowing said drainage boards to create an entirely new tax without any constitutional authority whatsoever or power lawfully vested in them by specifically declaring that "assessments made shall not constitute an indebtedness of a public corporation within any statutory or charter debt limitation" is a circumvention of the constitutional limitation upon taxation by labeling the burden imposed as an "assessment" rather than a tax as indeed it is when the municipality assessed spreads it at large or as an ad valorem tax;

33. That Plaintiffs allege that due process of law has been denied to them under Article II, Section 16 of the Michigan Constitution of 1908 and also under the Fourteenth Amendment, Section 16 of the Michigan Constitution of 1908 and also under the Fourteenth Amendment, Section 1 of the United States Constitution for the reason that Sections 467 of Chapter 20 of the Drain Code of 1956, as amended, relating to the preemptive making of a "Final Order of Determination" and subsequent method of notice to hear objections thereto, fails to provide proper, adequate, and constitutional notice and opportunity to be heard and present proofs or objections made, and that Section 469 of said Chapter 20, etc., relating to the preemptive making of a "Final Order of Apportionment," and subsequent method of Notice to hear objections thereto, also fails to provide proper, adequate and constitutional notice to be heard and present proofs on objections made, said sections thus impairing the full faith, credit and integrity of the bonds of the several drainage districts with respect to pending applications for loans and for contribution grants from Federal agencies which funds are intended to defray part of the cost of construction in anticipation of tax collections.

34. That although Section 468 of the Drain Code of 1956 was amended in 1957 by Public Act 37 to provide that:

> "A drainage board shall designate the area to be served by the drain project, which may or may not include all of the area in any public corporation to be assessed."

the defendant drainage boards have entirely disregarded this safeguard intended by the 1957 legislature to correct the obvious inequity existing and permit more equitable assessment of costs, and have laid assessments upon the defendant cities of St. Clair Shores, Roseville, and East Detroit, without relating areas assessed to benefits resulting.

35. That defendant City of St. Clair Shores having levied at large assessments laid upon it by the several drainage boards as a general tax has done so or is about to do so in violation of Article X, Section 21 of the Michigan Constitution providing for an approval by majority vote of electors when:

> "The total amount of taxes assessed against property for all purposes in any one year shall exceed one and one-half per cent (15 mills) of the assessed valuation of said property."

Further, that the said assessments at large are in violation of Section 7 of the Municipal Finance Act, being Act 202 of 1943 as amended, which Section requires as a condition precedent to approval for the issuance of bonds proposed, a

> "Voted increase in the tax rate limitation in an amount and for a period of time necessary to permit the collection of taxes in an amount sufficient to meet the interest and principal requirements on the proposed bonds";

36. Plaintiff further alleges that Defendant City of St. Clair Shores, by levying its apportionments at large against all taxpayers, adopts the fallacious theory that the assessments laid upon it by the several drainage boards is a tax within the meaning of constitutional provisions requiring taxes to be uniform and to be levied in proportion to the value of the property taxed: that said defendant City levying the assessment on such principles regards its assessment not as local in nature but as a general tax levied for a specific purpose; that such application of taxation is invalid in the absence of compliance with Article X, Section 21 of the Michigan Constitution of 1908 which provides for an election approving by majority vote an increase of the total amount of taxes beyond 15 mills in any one year of the assessed valuation of all property and is in violation of due process of law under both Federal and Michigan Constitutions, and further violates the validity of assessments to be apportioned according to benefits.

37. That Section 476, of said Chapter 20 of the Drain Code of 1956, providing for the issuance and payment of bonds and collection of assessments and installments on said bonds, is unconstitutional as denying due process of law violating Article IV, Section 1 and 2 of the Michigan Constitution of 1908 guaranteeing separation of powers and equal protection of the laws, by the illegal delegation of legislative and judical functions in the manner of levying and assessing taxes; that said Section 476 provides for the sale of bonds, pledging the full faith and credit of the various drainage boards which, indirectly pledges the full faith and credit of taxpayers and their properties by anticipating the sale of said bonds and the collection of all installments of assessments and taxes, which assessments and

taxes are herein challenged as unconstitutional in the preceding paragraphs hereof in Sections 465, 467, 468, 469, 471 and 473 of Chapter 20 of the Drain Code of 1956 as amended.

38. That Section 477, of said Chapter 20 of the Drain Code of 1956 is unconstitutional as denying due process of law by violating Article IV, Section 1 and 2 of the Michigan Constitution of 1908 guaranteeing separation of powers in that it delegates judicial and legislative functions to an administrative body by vesting such drainage boards with unlimited discretion in levying additional assessments should the original assessments for bond payments develop to be insufficient to pay the principal and interest on said bonds:

39. That Section 478, of said Chapter 20 of the Drain Code of 1956, is unconstitutional as denying due process of law by violating Article IV, Section 1 and 2 of the Michigan Constitution of 1908 guaranteeing separation of powers by the delegation of legislative and judicial functions, in that said section provides for the levying of a continuous tax, for operation and maintenance of drains in an amount to be established from time to time as these administrative drainage boards may see fit, without any standards or guidelines to follow, except that they shall be "in the same proportion as the cost of the drain was assessed":

40. That to Plaintiffs and all other property owners and taxpayers similarly situated, Section 480, of Chapter 20 of the Drain Code of 1956, is unconstitutional as denying due process of law and equal protection, in that said section is arbitrary, confiscatory and harsh; that coupled with the provisions of the Code providing for the unrestrained assessment power of drain boards, no limitations are placed upon them violating Article IV, Sections 1 and 2 of the

Michigan Constitution of 1908 relative to the separation of powers in that, said drainage boards:

1. Have the right to include in the cost of any drain the cost of locating, establishing, and constructing the drains, without limitation placed thereon, as to what bids should be accepted, what amounts are reasonable, or other items, included in the cost of drains;

2. Shall include administrative and other expenses without limitations of any nature;

3. Shall include the cost of construction of bridges and culverts without limitations thereon as to whether needs exist for bridges and culverts;

4. Shall include the cost of acquiring any lands and/or rights of way without limitation upon which lands are necessary;

5. Shall include all engineering, legal and other professional fees as part of the costs; no limitation being placed upon extent of engineering, legal, or other professional services required. Said section also includes, as part of the costs, an amount not exceeding ten (10%) per cent of the gross sum to cover "contingent expenses," without explanation, definition, guide or standard to determine reasonableness or limitation of expenses labeled as "contingent."

Further, allocation of ten (10%) per cent for "contingent expenses" under the Chapter 20 drain program proposed, estimated to cost Fifty ($50,000,000) Million Dollars, thus will make available for disbursement up to Five ($5,000,000.) Million dollars practically without supervision

or auditing and for any expense whatsoever directed or approved by the defendant Drain Commissioner and Drain Commission;

41. Have the power to defy and in fact defied constitutional officers of the State of Michigan in denying them access to the right of review of their books and records in order to comply with said officers' constitutional responsibilities in acting as watchdogs for the people and taxpayers involved in the drainage proceedings with respect to examining their financial activities and expenditures of the vast sums of public funds allocated and assessed by the drainage boards. This defiance is carried out in pursuit of the vast unbridled powers given to the drainage boards by Chapter 20 which Plaintiffs claim affords them no protection in the taking of their tax moneys and properties without sufficient safeguards to protect the reasonable expenditure of the same, and accounting therefor.

42. That Section 482, of Chapter 20 of the Drain Code of 1956, is unconstitutional as denying due process of law in that it provides for the cleaning out and widening, etc., of any existing county drain or portion thereof, or hereinafter existing, applying thereto the same method of financing as is used in the general construction of new drains, failing to take into consideration that existing County drains formerly created as special assessment districts were assessed according to benefits conferred to property owners instead of at large, the effect being to compel all taxpayers to contribute for services benefiting only those in the assessment district;

42. That as appears by Plaintiffs' Exhibit 1, hereto annexed, entitled: "Notice of sale—$468,000.00 County of Macomb, State of Michigan, Martin Sanitary Division

Drain Bonds", is a typical offering of bonds to be sold June 20, 1963, at eleven o'clock A.M.; That said Notice of Sale states among other things that "The assessment made against the City of St. Clair Shores has been paid in full, but the assessment against the City of Roseville is a general obligation of said City, and said City is obligated and has the power to *levy ad valorem taxes* upon all the property within its limits in an amount sufficient to pay the assessment against it, with interest without limitation as to rate or amount";

44. That the sale of bonds proposed by said Exhibit 1, aforesaid, is a typical exercise of the board powers vested under Chapter 20 of the Drain Code of 1956 as amended which powers are protested and challenged by this suit as unconstitutional under both Federal and State of Michigan Constitutional provisions; that said notice clearly stating that the cost assessed may be levied as ad valorem taxation, that is to say, as general taxes upon all property owners according to valuation without regard to benefits conferred or without regard to the burden contributed by the owners of lands to be drained;

45. That it is the intention of the Defendant Drain Commissioner and Defendant Drainage Boards of which the Bond offering in Paragraphs 43 and 44 is typical, to finance the construction of the drains proposed by the issuance of bonds, and to distribute said bonds in interstate commerce through securities dealers with offices in different states, who will offer and sell said bonds publicly to purchasers in various states.

Plaintiffs further allege that said proposed bonds, traversing in interstate commerce, will in fact be tainted with constitutional deficiencies in that a false presumption of

due process of law will be accorded to them when in fact said bonds will be devoid of due process of law as defined and intended under both the State of Michigan Constitution of 1908 and the United States Constitution, as hereinafter charged with more particularity.

46. Plaintiffs further allege that the statutory requirements of the Municipal Finance Act, Act 202 of 1943, as amended, for the approval by the Defendant Municipal Finance Commi sion therein created, of bonds proposed to be sold by drainage boards is unconstitutional in that it violates the equal protection and due process provisions of the United States Constitution and Michigan Constitution in:

(A) That the title "Municipal Finance Act", and the Commission created by it, the "Municipal Finance Commission," are both false and misleading; that the name "municipal" vested on both the act itself and its commission in Section 2(A) specifically includes, in addition to communities of people such as counties, townships, cities, and villages, administrative statutory bodies such as school districts, metropolitan districts, port districts, drainage districts "or other governmental authority or agency within the state with power to issue any of the obligations authorized or regulated by this Act";

(B) That the wholesale inclusion by definition of such other statutory bodies and agencies named and unnamed as "municipalities" creates a legal fraud and misrepresentation upon ultimate investment purchasers beyond the sophisticated and informed securities dealers who may purchase such bonds and obligations at discounts not exceeding ten (10%) per cent as provided in Section 2 of said Act 202 and also through underwriting arrangements, with

dealers who afterwards sell and distribute them in interstate commerce to uninformed investors as "municipal bonds," said securities dealers uniformly operating and advertising offerings out of their "Municipal Bond Departments";

47. That as a consequence of the misnomers created as complained of in sub-section (A) and (B) of Paragraph 46 above, a permissive lawful usage of the words "municipal", "municipality", "Municipal Finance Act", "Municipal Finance Commission", "Municipal Bond Department", etc., has become rampant, and although without redress to the investor when damage results (as it has in recent history) such appellations are false and misleading and practice fraud, deceit, and misrepresentation on naive and uninformed investors.

48. That many such investors in reliance of the ordinary connotation of the noun "municipal" or "municipality" consider that a community of people as taxpayers is responsible for the return of their principal investment, interest and profit, whereas, in truth and in fact, the pledge of full faith and credit of the administrative body or agency, deriving vast power of levying assessments upon true municipalities, collecting from them and disbursing moneys, is the sole entity relied upon as a matter of law; that the misrepresentation thus made wrongfully results in a release of liability of the taxing bodies, i.e., the Cities of St. Clair Shores, East Detroit and Roseville, if, as, and when said bonds in the hands of investors are by judicial decree declared to be invalid and uncollectable for any reason;

49. That such bonds and obligations, regardless of issuing source, being entitled to bear the outward impression of "municipal status are specifically exempt from

registration under the Federal Securities and Exchange Act of 1933, as amended, in Section 3A2, therein enjoying the august status of a "security issued or guaranteed by ***any public instrumentality of one or more states***, are sold distributed and dealt with freely in interstate commerce without any restraint whatever and, on information and belief, this feature of federal exemption, in contract to registration requirements attaching to private corporations, is often pointed to as an assurance of safety and security, all of which relates back to the false, misrepresentative definition granted such bonds and securities and operating as a fraud upon investors in interstate commerce;

50. That as aforesaid in Paragraphs 40, 42, 46A and 46B equal protection within the provisions of the Fourteenth Amendment, Section 1, of the Federal Constitution and Article II, Section 16, of the Michigan Constitution, is denied to persons in interstate commerce by operation of Act 202 of the Public Acts of 1943, as amended, and in particular with the defining section 2 (A) thereof, which in turn permits various sections throughout the said act to describe drainage boards, such as complained of in this complaint, as "municipalities" in turn creating a false and fraudulent status, albeit legal, based on legislative sanction but nonetheless wrongful, harmful, and deceitful, from which citizens were intended to be protected by the prohibition of the Fourteenth Amendment, Section 1 of the Constitution of the United States and by Article II, Section 16, of the Michigan Constitution.

51. That unless jurisdiction of these issues and matters is assumed and retained by the United States District Court for the Eastern District of Michigan, Southern Division, to pass upon the Constitutional questions involved, irrepara-

ble harm and financial loss will be suffered by investors within The State of Michigan and in other States upon adjudication that said bonds and the drainage boards issuing them fail to comply with either Federal and State of Michigan Constitutional requirements.

52. That unless a three (3) Judge District Court is convened in accordance with Title 28, United States Code, Sections 2281 through 2284, to hear the constitutional questions herein presented as to due process of law, separation of powers, and other questions raised herein, and grant equitable and injunctive relief to the Plaintiffs herein, these Plaintiffs will be irreparably harmed in that:

A. Tax moneys will be collected from them, which if they are successful in this matter, they have no hope of recovering since the statutes of the State of Michigan do not provide for the return of these tax moneys even if collected under protest.

B. Various municipalities within Macomb County, such as the City of St. Clair Shores, City of East Detroit, and City of Roseville will contribute from its general fund tax dollars paid by Plaintiff and all others in a similar position to the various illegal, unconstitutional drainage boards created by Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended.

C. The various drainage boards will continue to commit Plaintiffs and other taxpayers similarly situated and municipalities within their jurisdiction to extravagant financial burdens without their consent or approval and the consequent collateral expense for engineering and legal services, construction costs, and many other incidental charges naturally arising all of which will be paid from funds under their

control and none of which will be recoverable upon adjudication that such expenses were unconstitutionally contracted;

WHEREFORE, Plaintiffs pray:

1. That this Court adjudge all of the provisions of Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, being Sections 461 through 490 of said Drain Code, be declared and adjudged unconstitutional and void as a denial and violation of the Fourteenth Amendment of the Constitution of the United States, and in particular, of its due process and equal protection of the law clauses thereof; and of Article IV, Section 1 the full faith and credit clause thereof, and Article I, Section 8 (3), and the Interstate Commerce Clause thereof, and of the Constitution of the State of Michigan of 1908, Article II, Section 16 and Article IV, Sections 1 and 2, and Article X, Section 21, as hereinbefore set forth in the various paragraphs in this Complaint;

2. That this Court adjudge all of the Defendant drainage boards as unconstitutional in their powers and rights vested in them, and that their functions as Administrative boards be held to be in direct violation of the constitutional guarantees of these Plaintiffs and all others similarly situated, as provided for their protection in the Fourteenth Amendment of the United States Constitution under the due process clause and the equal protection clause thereof;

3. That this Court adjudge all of the Defendant drainage boards to be in violation of the provisions of the Michigan Constitution of 1908, Article IV, Sections 1 and 2, and of the United States Constitution as to separation of powers;

4. That this Court may require the Defendant Drain Commissioner and each of the Defendant drainage boards to show cause why they and each of them should not be permanently enjoined from taking any further proceedings or actions under the provisions of Chapter 20 of the Drain Code of 1956 as amended and that until such hearing, that they be temporarily restrained to function as drainage boards;

5. That this Court may enter an appropriate Order requiring that the Defendant Drain Commissioner and each and every drainage board cause and take whatever steps that may be necessary to refund to Plaintiffs and others similarly situated, all sums paid under assessments levied and collected ad valorem; that payments of assessments laid upon the Defendant Michigan State Highway Department and the Defendant County of Macomb be impounded and further payment by them be suspended and prohibited until the further order of this Court;

6. That this Court may enter its order voiding and nullifying all contracts and agreements entered into by the Defendant drainage boards and each of them with any persons, firms or corporations for any services or work of whatever nature and purpose; that pending final disposition of the issues involved in this suit, this Court provide by interim order adequate provision to preserve the status quo of all services and assets of such persons, firms or corporations concerned with the performance of any contractual obligation;

7. That this Court may enter its order requiring the Cities of St. Clair Shores, Roseville and East Detroit to impound all moneys collected from ad valorem levies based on assessments laid upon them by the Defendant drainage

boards, and that said cities be enjoined from transferring such funds or credits to the Macomb County Treasurer for the account of the Defendant Drain Commissioner or any and all of the Defendant drainage boards;

8. That this Court adjudicate each and every constitutional issue raised by this suit and in particular all constitutional infringements complained of as violating rights guaranteed to Plaintiffs as taxpayers under both Federal and State Constitutions; and of the Constitutional guarantees of persons not parties to this suit but who are affected by the issues raised regardless of their residence;

9. That the issues and matters raised in this suit and of which Federal adjudication is sought be heard and tried in accordance with Section 2284 of Title 28, United States Code by a three Judge District Court therein provided;

10. That Plaintiffs and all others similarly situated may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

And your Plaintiffs will ever pray.

WILSON M. JACKSON and
WILLIAM L. SANDERS
Attorneys for Plaintiffs
Suite 332 Eastland Center
Professional Building
Harper Woods 36, Michigan
Telephone: 371-5111

Dated: July , 1963.

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.

WILSON M. JACKSON, being first duly sworn, deposes and says that he is the attorney for the Plaintiffs herein named, and that he is authorized to execute this complaint on their behalf; that he has read the foregoing complaint and that the contents therein are true to his knowledge and belief except as to those matters therein stated to be on information and belief, and as to those matters, he believes them to be true.

WILSON M. JACKSON
Attorney for Plaintiffs

Subscribed and Sworn to Before me a Notary Public, in and for the County of Wayne, this ..... day of July, 1963.

.....

LOIS M. JOHNSTON
Notary Public, Wayne County, Mich.
My Commission Expires: .....

PLAINTIFFS' EXHIBIT 1

ADDITIONAL PARTIES PLAINTIFF IN ACCORDANCE WITH AMENDED COMPLAINT

A) ST. CLAIR SHORES:
R. H. MURPHY and GAIL MURPHY, his wife;
JOHN D. DANTA and ROSEMARIE J., his wife;
WALTER M. WHEELER
DAVID B. DEN BAAS and CHRISTINE DEN BAAS, his wife;
LUCIENNE WESTON

ARTHUR E. DARROW and MADELINE DARROW, his wife;
RONALD J. KUZILA and MARILYN KUZILA, his wife;
JAMES O'HARA;
ARNOLD WOODWARD;
THOMAS R. THILL;
WILLIAM K. RAE;
HOWARD J. CONLIN;
WILLIAM MATISEK;
JACK L. LEONARD and VERA G. LEONARD, his wife;
OLIVER JACOB and MARY JACOB, his wife;
ROBERT L. HENSEL;
LESTER SIGGINS;
JOHN A. ROBERTS and PATRICIA ROBERTS, his wife;
RALPH P. STEPHEN and VIRGINIA M. STEPHEN, his wife;
GEORGE ROGERS;
JAMES V. KAMER;
LARRY HIPELL;
JOHN J. HOCK and MARY JANE HOCK, his wife;
DAVID FAIRCHILD and NANCY L. FAIRCHILD, his wife;
CLYDE MELLIGAN and VERA C. MELLIGAN, his wife;
JAMES WHYTE and ISABELL M. WHYTE, his wife;
JOSEPH F. ROZANEK and VIRGINIA ROZANEK, his wife;
ARNOLD RICHTER and JOHANNE RICHTER, his wife;

ALVIN R. SCARBROUGH and JOYCE A. SCARBROUGH, his wife;
STANLEY J. PLUTSCHECK and SHIRLEY A. PLUTSCHECK, his wife;
ADRIAN A. LINGEMANN;
MATHEW J. GABERTY and DOROTHY GABERTY, his wife;
FRED PROCIDA;
LEROY WM. HOWARD and DOROTHY M. HOWARD, his wife;
JAMES J. O'REILLY and MABEL R. O'REILLY, his wife;
CHARLES L. DAVIS and LILLIAN DAVIS, his wife;
IRVING W. WATSON and GERTRUDE WATSON, his wife;
HARRY J. PEARCE;
VICTOR M. TEERLINCK;
CHARLES GAIGALAS and ANNA GAIGALAS, his wife;
EDMUND ZIMMERMAN and HELEN ZIMMERMAN, his wife;
RUDOLPH F. POLLOCK and RUTH POLLOCK, his wife;
W. E. FORAKER and SARA B. FORAKER, his wife;
GERALDINE D. CRATER;
H. A. NEY and MARIE NEY, his wife;
VINCENT T. DALE and MILDRED J. DALE, his wife;
PETER WYTKA and SHIRLEY WYTKA, his wife;
HERMAN SCHUTZ and ANNA SCHUTZ, his wife;
GEORGE J. GEIGLE;
JOHN N. LESLIE and EMMA LESLIE, his wife;

F. B. TANNER and MARGUERITE TANNER, his wife;
LOUIS S. KOCH and KATHERINE KOCH, his wife;
JOSEPH DELISO, JR.;
HARRY D. JESSEE;
JAMES W. LOMBARDO;
DONALD L. GOLEMBA and BEVERLY A. GOLEMBA, his wife;
RICHARD A. WEBB;
STEPHEN R. KOROL and BETTY J. KOROL, his wife;
CLIFTON H. GABLER and JUNE E. GABLER, his wife;
RAYMOND M. SPENCER and NORMA M. SPENCER, his wife;
NORMAN F. FLYNN and FRANCES M. FLYNN, his wife;
ROBERT F. WILSON and JOAN D. WILSON, his wife;
DOUGLAS R. CROSS

B) EAST DETROIT
CHARLES W. SMALSTIG and ASENATH SMALSTIG, his wife;
EDWARD D. GAPS;
HAROLD D. JACOB and JOYCE M. JACOB, his wife;
EARL W. RISTOW and SHIRLEY A. RISTOW, his wife;

C) ROSEVILLE
STEWART W. BARRY and SOPHIE M. BARRY, his wife;
HAROLD R. HAVERCAMP and MARLENE B. HAVERCAMP, his wife;

JAN WIGMAN;
CHARLES E. REAGAN and SHIRLEY J. REAGAN, his wife;
RICHARD F. BENOIT and SUE F. BENOIT, his wife;
J. C. CORNILLIE;
JOHN C. LAMBRECT d/b/a LAMBRECT LUMBER & SUPPLY CO.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION
NO. 24000

FAIR DRAIN TAXATION, INC., a non-profit Michigan Corporation, JAMES J. SOULIGNY and JUANITA A. SOULIGNY, his wife, JOHN DYER-HURDEN and DOLORES DYER-HURDEN, his wife, ZACK D. EVANS and DOROTHY EVANS, his wife, LOUIS J. STAN and JOSEPHINE STAN, his wife, JOHN DURST and DOROTHY DURST, his wife, KARL R. HILDENBRAND and HALINA HILDENBRAND, his wife, THOMAS SYMS and JULIA SYMS, his wife, and W. ROSS JONES and ELIZABETH JONES, his wife,

Plaintiffs

—vs.—

CITY OF ST. CLAIR SHORES, a Michigan Municipal Corporation, CITY OF ROSEVILLE, a Michigan Municipal Corporation, CITY OF EAST DETROIT, a Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE EIGHT AND ONE-HALF MILE RELIEF DRAIN,

a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE STEPHENS RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE TEN MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE ELEVEN AND ONE-HALF MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE LAKE BOULEVARD RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE FORTIN RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE SOCIA-COUCHEZ RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE MARTIN SANITARY DIVERSION DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE HECHTLER RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE MULSO-LIPKE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE TEBO RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE ALEXANDER RELIEF DRAIN, a so-called Michigan Municipal Corporation.

All of which said Drainage Boards, so-called Michigan Municipal Corporations, consist of the following members and parties defendant herein:

THOMAS S. WELSH, Macomb County Drain Commissioner and Chairman of each of said Drainage Boards, BERNARD KALAHAR, Chairman of the Macomb County Board of Supervisors and member of each of said Drainage Board, FRANK BIEHL, Chairman of the Finance Committee of the Macomb County Board of Supervisors and

member of each of said Drainage Boards, (as provided in Chapter 20 of the State of Michigan Drain Code of 1956, as amended); The COUNTY OF MACOMB, a public corporation of the State of Michigan, The HONORABLE JOHN C. MACKIE, State Highway Commissioner of the State of Michigan, and The MICHIGAN MUNICIPAL FINANCE COMMISSION, a statutory administrative body,

Defendants

OPINION

O'Sullivan, Circuit Judge,
Levin, Chief District Judge,
Machrowicz, District Judge.

Thaddeus M. Machrowicz, District Judge

This is a class action instituted on behalf of the named plaintiffs of the Michigan cities of St. Clair Shores, East Detroit, and Roseville and all other similarly situated taxpayers of the State of Michigan to enjoin as unconstitutional the enforcement or the taking of any proceeding under the provisions of §§ 11.1461-11.1490 Mich. Stat. Ann., commonly known as and herein referred to as Chapter 20 of the Michigan Drain Code of 1956.

It may be said at the outset that litigation with respect to practically all the issues in this action has been before various courts of the State of Michigan immediately following the enactment of this legislation and continues to this day. As early as 1957, in *Connor* v. *Herrick*, 349 Mich. 201, and *Black Marsh Drainage District* v. *Rowe*, 350 Mich. 470, the Supreme Court of Michigan dealt with many of the issues presented here. See also subsequent opinions of the court of last resort of Michigan, *Twp. of Southfield*

Drainage Board for Twelve Towns Relief Drains, 357 Mich. 59 (1959); *City of Madison Heights* v. *Twelve Towns Relief Drains Drainage Board*, 361 Mich. 322 (1960); *In Re Petition of Macomb County Drain Commissioner*, 369 Mich. 641 (April 5, 1963).

The action was instituted by an original complaint filed on June 19, 1963, and pursuant to an order to show cause as to why a temporary injunction should not be issued as prayed for, a hearing on June 25, 1963, was had by this three-judge statutory court, 28 U.S.C. § 2281, 2284, and the application for a temporary injunction was denied. Because of the history of the many attacks upon this legislation in the state courts and despite the fact that no formal petition to dismiss was filed by the defendants, the court indicated that it was prepared to hear the parties on the merits of the complaint. However, plaintiffs' counsel stated that they were not prepared to discuss the merits of the complaint and asked for an adjournment to July 9, 1963, which was granted. The court, on that day, had before it a formal motion filed and served on July 1, 1963, by the defendants to dismiss the complaint and also had before it an amended complaint filed two (2) days previously with the consent of the court. Upon reviewing the amended complaint, and after a full hearing and admissions by plaintiffs' counsel, the court determined that the amended complaint did not present any new substantial matters not already included in the original complaint and proceeded to hear argument from all parties on the motion to dismiss the amended complaint.

The plaintiffs do not deny that the projected drains are essential for the health and safety of the communities of the state and they do not allege that there is fraud or other

improper conduct upon the part of any state official in the performance of his duty pursuant to the responsibilities imposed by the statute. Being satisfied that this litigation is vexatious in nature and that delay in announcing judgment would further harass and impede the carrying out of commitments for the financing of drains by governmental and private agencies and consequently retard the construction of the drain improvements found to be required by appropriate authorities, the court, before the close of the day of the hearing, entered a formal order dismissing the complaint with prejudice. The court expressed its intention to file a memorandum setting out its views with respect to the several issues raised by the plaintiffs.

Chapter 20 of the Drain Code of 1956 sets up a method by which the State of Michigan, a particular county, and the several public corporations[1] in that county may initiate by petition drain projects which are necessary for the public health and the cost of which is to be assessed wholly against the public corporations to be benefitted by the proposed drain.

Under the statute, a drain board is a *legislative body* created for each proposed drain. Its membership consists of the County Drain Commissioner, the Chairman of the Board of Supervisors, and the Chairman of the Board of County Auditors or of the Finance Committee of the Board of Supervisors. The drain district embraces the communities which are to be assessed for the cost of the drainage project. Pursuant to sections 467 and 469, the drainage board is to meet on two different occasions to hear objec-

[1] The term "public corporation" shall be deemed to include the state of Michigan, counties, cities, villages, townships, metropolitan districts and authorities created by or pursuant to state statutes. Section 11.1461 (b) M.S.A.

tions. On the first occasion, the board is to hear any objections to the proposed drain and to the matter of assessing the cost of such drain to the designated public corporations. The statute further provides that:

> "After such hearing, the drainage board shall make a determination as to the sufficiency of the petition, the practicability of the drain, whether the drain should be constructed, and if so, the public corporations to be assessed, and shall issue its order accordingly, which order shall be known as the 'final order of determination.' "

and that

> "No public corporation may be eliminated from, or added to, those tentatively determined to be assessed without a rehearing after notice, as above provided." Section 467.

On the second occasion, the board is to hear any objections made to the tentative apportionment of costs among the public corporations to be assessed. After such hearing or rehearing,

> ". . . the drainage board shall issue its order setting forth the several apportionments as confirmed, which order shall be known as the 'final order of apportionment.' " Section 469.

Notice for both public hearings and rehearings is provided for by sections 467 and 469:

> "Notice of such hearing shall be published twice in the county by inserting the same in at least 1 newspaper published therein, designated by the drainage board, with the first publication to be not less than 20 days prior to the time of hearing. Such notice shall

> also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that any notice to the state shall be sent to the state highway commissioner and any notice to a county shall be sent to both the county clerk and the county road commission, if any, which mailing shall be made not less than 20 days prior to the time of hearing."

Judicial review of the final order of determination and the final order of apportionment is limited under section 483 to:

> ". . . proceedings in certiorari brought within 20 days after the filing of such order in the office of the chairman of the board issuing the same. If no such proceeding shall be brought within the time above prescribed, the drain shall be deemed to have been legally established and the legality of the drain and the assessments therefor shall not thereafter be questioned in any suit at law or in equity, either on jurisdictional or nonjurisdictional grounds."

Section 473 provides for the preparation of the special assessment roll, which assesses the estimated cost of the drain against the several public corporations in accordance with the confirmed apportionments. The drainage board is empowered to permit the payment of the estimated assessment in annual installments, not exceeding thirty.

In cases where the assessment is not paid in full, section 474 calls for an annual assessment against public corporations similar to the assessment of private property by a municipal corporation. Chapter 20 gives the assessed public corporation the choice among three ways of financing the assessment; (1) Levy an *ad valorem* tax on all property;

(2) Levy a special assessment against the property receiving a special benefit, if any; and (3) Impose a connection charge. Sections 475, 490.

Chapter 20 drain proceedings in the State of Michigan have engendered considerable litigation in the state courts. The type of public improvement contemplated by Chapter 20 is one involving several public corporations and is designed to be used where it is more efficient and less expensive to incorporate a project into one large public improvement rather than to have each public corporation build its own separate smaller public improvement.

The plaintiffs allege that as citizens or taxpayers of the City of St. Clair Shores, Chapter 20 deprives them of their constitutional rights to vote on the question of whether or not the tax limitations of the City of St. Clair Shores shall be increased or otherwise changed by reason of the assessment against said city of portions of the cost of each drain project, or by reason of the obligation of the city to raise money to pay said assessment. This argument was made and rejected in *Southfield* v. *Drainage Board*, 357 Mich. 59.

The plaintiffs further contend that Chapter 20 is unconstitutonal because it unlawfully delegates to the City of St. Clair Shores and to the defendant drain boards and drain districts legislative and judicial powers. Chapter 20 was held constitutional in *Black Marsh Drain District* v. *Rowe*, 350 Mich. Under the 14th Amendment a legislature may either provide for the creation of a special district itself or delegate this authority to a tribunal. *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 175.

The fact that lands in different public corporations benefitted by the same drain might and probably would be

assessed at different rates presents no meritorious constitutional challenge, since many citizens in public municipalities pay at a different rate for essentially equal services due to the structure of the municipality involved. It is not unreasonable for the legislature to have created the respective drain districts embracing the municipalities to be benefitted by the drain and for such drainage districts to determine the assessments to be made upon the municipalities which have the authority to make assessments on the individual property owners.

Further, under the due process clause, it is clearly constitutional to levy a general *ad valorem* tax for a local improvement benefitting some lands more than others. See *Fallbrook* v. *Bradley*, 165 U.S. 112, 176; *Connor* v. *Herrick*, 349 Mich. 201, 244. (Opinion of Mr. Justice Carr adopted by the court in *Black Marsh Drainage District* v. *Rowe*, 350 Mich. 470). Also, special assessment districts set up according to special benefits are constitutional. *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 705; *Cummings* v. *Garner*, 213 Mich. 408. Therefore, it is permissible for the legislature to give the assessed public corporation the option of either levying a general *ad valorem* tax or providing for a special assessment.

Plaintiffs further contend that the notice provisions of sections 467 and 469 violate both the state and the federal constitutions. It is important to recognize that the final orders of determination and apportionment bind the public corporations involved, which must receive notice by registered mail under the statute. Notice by publication is also

provided, but plaintiffs contend that they are entitled, as the class of people which may ultimately bear the burden of paying for the drain, to more effective notice than that of publication. But as such a class, plaintiffs are effected only indirectly and to the same degree as all other taxpayers in the preliminary stages of Chapter 20 proceedings which culminate in the final orders of determination and apportionment. Not until the proceedings reach the stage where it becomes necessary to decide what proportion of the cost of the proposed improvement shall be assessed to the particular parcel of land which each plaintiff owns, must opportunity be given to them as owners to be heard upon that question (see *Voight* v. *Detroit*, 184 U.S. 115), and Michigan law affords opportunity to question such direct assessment on their property, upon proper notice and at an adequate hearing. See also *Chicago etc. R.R.* v. *Risty*, 276 U.S. 567; *Embree* v. *Kansas City Road Dist.*, 240 U.S. 242; *Soliah* v. *Heskin*, 222 U.S. 522; *Londoner* v. *Denver*, 210 U.S. 373; *Goodrich* v. *Detroit*, 184 U.S. 432. We hold, therefore, that the notice provisions contained in sections 467 and 469 of Chapter 20 are constitutional.

One further word—One of the allegations in plaintiffs' shotgun amended complaint is that the issuance of bonds by defendants drainage boards to provide funds for the construction of drains would result in a burden on interstate commerce in violation of Article 1, Section 8 of the Constitution. They do not allege that they are misled by either the bond and notice of sale provisions or by any underlying Michigan legislative enactments. This does not require any discussion, but it is strange indeed that the plaintiffs take the position that they have a right to appear on behalf of others to assert federal constitutional guarantees.

We have considered section 1341, 38 U.S.C.[1] but do not deem it necessary to discuss its application to this amended complaint.

THADDEUS M. MACHROWICZ,
U.S. District Judge

Dated at Detroit, Michigan this
16th day of July, 1963.

A TRUE COPY
JULIUS L. KABATSKY, Clerk
By: WALTER BIELSKI, Deputy Clerk

[1] "The District courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the state courts of such state."

CHAPTER 20

INTRACOUNTY DRAINS; PUBLIC CORPORATIONS

§ 11.1461 Definitions.] SEC. 461. Whenever used in this chapter, except when otherwise indicated by the context:

(a) The term "state" shall be deemed to mean the state of Michigan.

(b) The term "public corporation" shall be deemed to include the state of Michigan, counties, cities, villages, townships, metropolitan districts and authorities created by or pursuant to state statutes.

(c) The term "agencies" shall be deemed to include those officers, boards, commissions and other bodies created by public corporation or by the federal government, which are authorized to act in their own names.

(d) The term "county drain" shall be deemed to mean any drain as defined in this act, irrespective of size, carrying drainage water and or sewage originating in 1 county. The finding of the drainage board that all drain water and sewage does originate in 1 county shall be final. In making such determinations, the drainage board may disregard any drainage from another county which it deems to be inconsequential.

(CL '48, § 280.461.)

§ 11.1462 Construction of county drain necessary for public health; assessment of cost against public corporation.] SEC. 462. County drains which are necessary for the public health may be located, established and constructed under the provisions of this chapter where the cost thereof is to be assessed wholly against public corporations. (CL '48, § 280.462.)

§ 11.1463 Same; petition, filing, signatures, contents.] SEC. 463. Whenever it shall be necessary for the public health to locate, establish and construct a county drain, then a petition therefor may be filed with the county drain commissioner signed by 2 or more public corporations which will be subject to assessments to pay the cost thereof. Such petition shall state that it is filed pursuant to the provisions of this chapter and shall describe the location and route of such proposed drain sufficiently to determine with reasonable certainty the areas to be drained thereby. Attached to said petition shall be a certified copy of the resolution of the governing body of each signer authorizing the affixing of its signature thereto. Such petition may be filed in more than 1 counterpart. (CL '48, § 280.463.)

§ 11.1464 Same; drainage board, membership, compensation of supervisor members, chairman; minutes; records and files.] SEC. 464. There is hereby created for each project petitioned for under the provisions of this chapter, a drainage board to consist of the drain commissioner of the county, the chairman of the county board of supervisors and the chairman of the board of county auditors; Provided, That if there be no board of county auditors in any such county, then the chairman of the finance committee of the board of supervisors shall act as a member of said drainage board, and if there be neither a board of county auditors nor finance committee, then the chairman of the board of supervisors shall select from time to time 1 member of the board of supervisors of his county to act as a member of said drainage board. The chairman of the board of supervisors and any member of a board of supervisors serving on the drainage board shall receive the same compensation and mileage as provided for members of the board of supervisors. The county drain commissioner shall be chairman of

the drainage board. He shall keep minutes of the proceedings of the drainage board and all records and files of the board shall be kept in his office. (CL '48, § 280.464.)

§ 11.1465 Meetings of drainage board; calling, notice, quorum, adjournment, majority vote, signing of orders by chairman.] SEC. 465. Meetings of the drainage board may be called by the chairman or any 2 members thereof, upon notice sent by registered mail to each member, setting forth the time and place thereof, which notice shall be mailed not less than 5 days previous to the time of the meeting. The affidavit of the chairman as to such mailing shall be conclusive proof thereof. No notice of any meeting shall be required if all members are present. Any member of said board may waive notice of any meeting, either before or after such meeting. A majority of the members of the board shall constitute a quorum for the transaction of business, but a lesser number may adjourn from time to time. Any meeting may be adjourned from time to time. Unless otherwise provided herein, no action shall be taken by said board except by a majority vote of its members. In the event of the adjournment of any hearing, it shall not be necessary to advertise the adjournment of such hearing. All orders issued by the drainage board shall be signed by the chairman. (CL '48, § 280.465.)

§ 11.1466 Same; first meeting, notice.] SEC. 466. Upon receipt of a petition as hereinbefore provided, the county drain commissioner shall call the first meeting of the drainage board. In the event there be no board of county auditors or finance committee in the county, then notice to the chairman of the board of supervisors of such county shall be deemed to be notice to the member of the board of supervisors to be selected by him. (CL '48, § 280.466.)

§ 11.1467 Duty of drainage board at first meeting; composition of district; hearing of objections, notice; final order of determination; elimination or addition of public corporations.] SEC. 467. The said drainage board at its first meeting shall consider the petition for the project and make a tentative determination as to the sufficiency thereof and the practicability of the proposed drain, and shall also make a tentative determination of the public corporations to be assessed. Said drainage board shall give a name to the drain and to the drainage district. The district shall be composed of the public corporations to be assessed for the cost of the project. After the drainage board has made the determination specified in the first sentence of this section, then it shall fix a time and place when and where it will meet to hear any objections to the proposed drain and the petition therefor, and to the matter of assessing the cost of such drain to the designated public corporations. Notice of such hearing shall be published twice in the county by inserting the same in at least 1 newspaper published therein, designated by the drainage board, with the first publication to be not less than 20 days prior to the time of hearing. Such notice shall also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that any notice to the state shall be sent to the state highway commissioner and any notice to a county shall be sent to both the county clerk and the county road commission, if any, which mailing shall be made not less than 20 days prior to the time of hearing. Such notice shall be signed by the chairman and proof of the publication and mailing thereof shall be filed in his office. The drainage board may provide a form to be substantially followed in the giving of such notice. At such hearing, any public corporation to be assessed or any taxpayer thereof

shall be entitled to be heard. After such hearing, the drainage board shall make a determination as to the sufficiency of the petition, the practicability of the drain, whether the drain should be constructed, and if so, the public corporations to be assessed, and shall issue its order accordingly, which order shall be known as the "final order of determination." No public corporation may be eliminated from, or added to, those tentatively determined to be assessed without a rehearing after notice, as above provided. (CL '48, § 280.467.)

§ 11.1468 Plans, specifications and estimate of cost; route of drain; apportionment of cost after designation of area to be served; assumption by county of additional cost.]

SEC. 468. The drainage board shall proceed to secure from a competent engineer, plans, specifications and an estimate of cost of the proposed drain, which, when adopted by said board, shall be filed with the chairman thereof. In approving the route of the drain, the drainage board shall not be limited to that described in the petition. The drainage board shall then proceed to tentatively establish the percentage of the cost of such drain which is to be borne by each public corporation. In making the apportionments hereunder, there shall be taken into consideration the benefits to accrue to each public corporation and also the extent to which each public corporation contributes to the conditions which make the drain necessary: Provided, That apportionments against the state shall be based solely upon the drainage of state highways, and those against the county shall be based solely upon the drainage of its county highways. [Before any tentative apportionment shall hereafter be made, the drainage board shall designate the area to be served by the drain project, which may or or may not include all of the area in any public corporation to be assessed.] Nothing

herein contained shall prohibit the county from assuming any additional cost of said drain if 2/3 of the members-elect of the county board of supervisors shall vote in favor thereof. (CL '48, § 280.468.)

§ 11.1469 Objections to apportionment; hearing, notice; confirmation of apportionments; readjustment; final order of apportionment.] SEC. 469. After the foregoing tentative apportionments of cost have been made, then the drainage board shall set a time and place when and where it will meet and hear any objections to such apportionments. Notice of such hearing shall be published twice in the county by inserting the same in at least 1 newspaper published therein, designated by the drainage board, the first publication to be not less than 20 days prior to the time of hearing. Such notice shall also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that any notice to the state shall be sent to the state highway commissioner and any notice to the county shall be sent both to the county clerk and the county road commission, if any, which mailing shall be made not less than 20 days prior to the time of hearing. Such notice shall be signed by the chairman and proof of the publication and mailing thereof shall be filed in his office. The drainage board may provide a form to be substantially followed in the giving of such notice. The notice shall include tentative apportionments to the several public corporations. At such hearing, any public corporation to be assessed or any taxpayer thereof shall be entitled to be heard. After such hearing, the drainage board may confirm the apportionments as tentatively made, or if in any respect it shall deem such apportionments to be inequitable, it shall readjust the same: Provided, That if such readjustment shall involve the increasing of any assessment and such

increase shall not be consented by the resolution of the governing body of the public corporation whose assessment was increased, then before any readjusted apportionments shall be confirmed the drainage board shall set a time and place for a rehearing and shall give notice thereof as in the first instance, which notice shall also set forth the apportionments as readjusted. After confirmation, the drainage board shall issue its order setting forth the several apportionments as confirmed, which order shall be known as the "final order of apportionment." (CL '48, § 280.469.)

§ 11.1470 Securing necessary lands and rights of way.] SEC. 470. The drainage board shall then proceed to secure the necessary lands and or rights of way for the proposed drain. If the same cannot be secured by negotiation, then the drainage board may proceed under the provisions of Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41, inclusive, of the Compiled Laws of 1948, and shall be deemed to be a "state agency" as that term is used in said act, or if the project is one in which the federal government is participating in any manner, then such lands and or rights of way may be acquired through proceedings brought by the federal government under any appropriate federal act. In the event lands and or rights of way shall be acquired through proceedings under a federal act, then the amount of the awards in such proceeding shall be deemed to be a part of the cost of the drain to the same extent as if the condemnation proceedings had been taken under the laws of this state. (CL '48, § 280.470.)

§ 11.1471 Contracting with federal government or private or public corporation; starting of construction, bids, exception.] SEC. 471. The drainage board may contract with the federal government (which term as used in this

section shall include any agency thereof) whereby the federal government will pay the whole or any part of the cost of the project and/or will perform the whole or any part of the work connected therewith, which contract may include any specific terms required by act of congress or federal regulation as a condition for such participation on the part of the federal government The drainage board may also contract with any private corporation or with any public corporation (which term as used in this section shall include any agency thereof) in respect to any matter connected with the construction and/or maintenance of any drain. Such a contract may provide that any payments made or work done by such public corporation shall relieve it in whole or in part from assessment for the cost of the project. No construction work shall be undertaken until the drainage board has advertised for and received bids for the performance of such work: Provided, That this provision shall not apply to work to be performed by the federal government or a public corporation. (CL '48, § 280.471.)

§ 11.1472 County treasurer custodian of district funds; bond; moneys to be paid out only on order of board, exception.] SEC. 472. The county treasurer shall be the custodian of the funds of the drainage district. The drainage board may require the county treasurer to furnish a bond payable to the drainage district, in addition to any bond payable to the county, conditioned upon the faithful discharge of his duties in respect to moneys belonging to the drainage district, the premium thereon to be paid by the drainage district. Moneys held by said treasurer shall be paid out only upon order of the drainage board, except that no such order shall be required for the payment of principal and interest on bonds. (CL '48, § 280.472.)

§ 11.1473 Special assessment roll; preparation; payment of assessments, interest; advance payment.] SEC. 473. After the confirmation of the apportionments by the drainage board, it shall cause to be prepared by the chairman of said board a special assessment roll assessing the estimated cost of the drain (or if the actual cost has been ascertained, then such actual cost) against the several public corporations in accordance with the confirmed apportionments. The drainage board may provide for the payment of such special assessments in any number of ◆ annual installments, not exceeding 30[, but no installment shall be less than 40% of any subsequent installment]. Installments of assessments shall become due and payable on or before April first of each year. The drainage board shall fix the amount of interest, not exceeding 6%, to be paid upon unpaid installments, which interest shall become due annually on the day and month upon which the annual installments become due. ◆ [The drainage board may provide for the payment of any installments in advance of their respective due dates and may prescribe the terms and conditions thereof.] The drainage board shall fix the time or times for the payment of the first installment so that each public corporation can make a tax levy for the payment thereof. (CL '48, § 280.473.)

§ 11.1474 Same; contents, approval; certification of assessment to public corporation assessed; notification of due installments and interest, payment; advancement of money for payment by county treasurer, reimbursement; assessments against state; levy of taxes; assesment roll prepared on basis of estimated cost, correction of assessments.] SEC. 474. The special assessment roll shall contain the name of each public corporation assessed, the total estimated cost of the project (or actual cost if the same has been ascertained at the time of the preparation of the roll),

the percentage apportioned to each public corporation, the amount of the assessment against each public corporation based upon the said percentage of apportionment, and the amount of each installment if the assessment is divided into annual installments. After the said special assessment roll has been prepared, it shall be presented to the drainage board for approval. When such roll shall have been approved, then a statement to that effect, signed by the chairman of the drainage board, shall be affixed to said roll setting forth the date of such approval. The chairman of the drainage board shall then certify to each public corporation assessed the amount of the total assessment against it, the amount of the various installments if such assessment is divided into installments, the due date of each installment and the rate of interest upon installments from time to time unpaid. The chairman shall also each year, at least 30 days prior to the time of the levying of taxes by each public corporation, notify it of the amount of the installment and interest next becoming due: Provided, That the failure to so notify any public corporation shall not excuse it from making payment of such installment and interest. On or before the due date of any installment, each public corporation shall pay to the county treasurer the full amount thereof, together with interest accruing to such due date. If any such public corporation shall fail or neglect to so account to the county treasurer for the amount of any such installment and interest, then the county treasurer shall advance the amount thereof from county funds and deduct the same from any moneys (other than those pledged for the payments of debts) then or thereafter payable by him to such public corporation. The board of supervisors of any county which shall have advanced any money for a public corporation and which shall not have been reimbursed therefor,

may order such public corporation and its officers to levy upon its next tax roll an amount sufficient to make such reimbursement on or before the date when its taxes become delinquent; and it shall be the duty of such public corporation and its tax levying and collecting officials to levy and collect such taxes and to reimburse the county: Provided, That the foregoing shall not prevent the county from obtaining reimbursement by any other legal method. Assessments against the state shall be certified to the state highway commissioner and paid from state highway funds. It shall be the duty of the tax levying officials of each of the other public corporations assessed to levy sufficient taxes to pay assessment installments and interest as the same shall become due unless there shall have been set aside moneys sufficient therefor. Any city may elect to spread such tax levy upon the county tax roll instead of the city tax roll. If a special assessment roll shall be prepared upon the basis of the estimated cost of the project, then after the actual cost has been ascertained and determined by the drainage board, the special assessments and the installments thereof shall be corrected by adding any deficiency or deducting any excess. The drainage board may order such corrections to be made upon the original roll or may order that a new corrected roll or a supplemental roll be prepared and submitted for approval by the drainage board. (CL '48, § 280.474.)

§ 11.1475 Assessments and taxes as not within debt or tax limitations; constitutional tax limits, observance.] SEC. 475. Assessments made under the terms of this chapter shall not constitute an indebtedness of a public corporation within any statutory or charter debt limitation, and taxes levied by a public corporation for the payment of such assessments shall not be deemed to be within any

statutory or charter limitation. [Noting contained in this chapter shall be construed as requiring any county, township, metropolitan district or authority to levy a tax beyond its constitutional tax limitation or any lawful increase thereof.] (CL '48, § 280.475.)

§ 11.1476 Issuance of bonds; payment; collections of assessment installments to be kept in separate bank account, use.] SEC. 476. The drainage board may issue bonds for and on behalf of the drainage district, in anticipation of the collection of any or all installments of assessments or any part thereof, and pledge the full faith and credit of the drainage district for the prompt payment of the principal thereof and the interest thereon. Such bonds shall mature serially with the last maturity not later than 2½ years after the due date of the last installment of the assessments: Provided, That there may be more than 1 principal maturity date during any 12-month period. The bonds shall be signed by the chairman and at least 1 other member of the drainage board and the facsimile signature of the chairman shall be affixed to the interest coupons attached thereto. Collections of both principal and interest on all installments of assessments in anticipation of which bonds shall have been issued shall be kept in a separate bank account by the county treasurer and used for no other purpose than the payment of principal and interest on such bonds until the full payment thereof. (CL '48, § 280.476.)

§ 11.1477 Same; assessments insufficient to pay principal and interest, additional assessments.] SEC. 477. If, for any reason, the original assessments shall not be sufficient to pay the principal and interest on bonds issued in anticipation of the collection thereof, then the drainage board shall make such additional assessments therefor as may be

necessary, apportioned as in the first instance, it being the intention hereof that the collections on assessments shall, under all circumstances, be sufficient to pay said principal and interest. (CL '48, § 280.477.)

§ 11.1478 Drainage board to continue in existence; responsible for operation and maintenance of drain; payment of expenses.] SEC. 478. The drainage board for each project shall continue in existence with such changes in personnel as shall result from changes in the officers constituting the board membership. It shall be responsible for the operation and maintenance of the drain. Any necessary expenses incurred in administration and in the operation and maintenance of the drain shall be paid by the several public corporations assessed, in the same proportion as the cost of the drain was assessed. (CL '48, § 280.478.)

§ 11.1479 Advancement of moneys by public corporation; reimbursement.] SEC. 479. Any public corporation may advance moneys for the payment of any part of the cost of a project hereunder in which event it shall be reimbursed by the drainage district when funds are available therefor. (CL '48, § 280.479.)

§ 11.1480 Cost of drain, what included.] SEC. 480. The cost of any drain shall include (1) the cost of locating, establishing and constructing the drain; (2) the administrative and other expenses of the drainage board; (3) the cost of construction of bridges and culverts; (4) the cost of acquiring any lands and/or rights of way; (5) all engineering, legal and other professional fees; (6) the cost of the service and publication of all notices; (7) interest on bonds for the first year, if bonds are to be issued; and (8) an amount not exceeding 10% of the gross sum to cover contingent expenses. (CL '48, § 280.480.)

§ 11.1481 Assessment against township as a whole; assessment of village separately.] SEC. 481. Unless otherwise provided by the drainage board, assessments against a township shall be against the township as a whole, including any incorporated village, but the drainage board may determine to assess a village separately, in which case the assessment against the township shall be exclusive of the village and the tax levies to be made by the township to pay such assessment shall not include any property taxable in the village. (CL '48, § 280.481.)

§ 11.1482 Cleaning, relocating, widening, etc., of county drain; financing of cost.] SEC. 482. Any county drain or any portion thereof, now or hereafter existing, may be cleaned out, relocated, widened, deepened, straightened, tiled or otherwise improved, when necessary for the public health, in the same manner as a county drain may be located, established and constructed under this chapter, with such variations in the proceedings as may be necessary to make the same applicable, and also the cost thereof may be financed in like manner. (CL '48, § 280.482.)

§ 11.1483 Attack of final order of determination or final order of apportionment; certiorari, time, effect of failure to bring.] SEC. 483. Neither the final order of determination nor the final order of apportionment shall be subject to attack in any court, except by proceedings in certiorari brought within 20 days after the filing of such order in the office of the chairman of the board issuing the same. If no such proceeding shall be brought within the time above prescribed, the drain shall be deemed to have been legally established and the legality of the drain and the assessments therefor shall not thereafter be questioned in any

suit at law or in equity, either on jurisdictional or non-jurisdictional grounds. (CL '48, § 280.483.)

§ 11.1484 Operating under terms of chapter, applicability of provisions of other chapters.] SEC. 484. In operating under the terms of this chapter, the several boards and officials shall not be limited by the provisions contained in other chapters of this act and the procedures required under the terms of such other chapter shall not be deemed to be applicable: Provided, That when not contrary to the express provisions of this chapter, any provision or provisions in other chapters of this act may be incorporated by recital or by references into any order or resolution of the drainage board, and when so incorporated shall be deemed applicable to the project under this chapter. (CL '48, § 280.484.)

§ 11.1485 Two or more public corporations constituting a contiguous territory and served by one or more drains; relief drains, construction and financing.] SEC. 485. When 2 or more public corporations, constituting as a whole contiguous territory, are served by 1 or more county drains, and it shall become necessary for the public health to supplement such existing drain or drains by constructing 1 or more relief drains, which may consist of new drains and/or extensions, enlargements and/or connections to existing drains, then the entire project may be constructed and financed as a whole under the provisions of this chapter and the word "drain" shall be deemed in include such a project. (CL '48, § 280.485.)

11.1486 Applicability of chapter to drain entirely within limits of public corporation; signature of petition.] SEC. 486. The terms of this chapter shall be applicable to any county drain located, or proposed to be located, entirely within the limits of a single city, village or township, if

such public corporation shall consent thereto by resolution adopted by its governing body. In such case any petition required to be filed hereunder shall be sufficient if signed by such public corporation only. (CL '48, § 280.486.)

§ 11.1487 Drain commissioner acting by deputy; vice-chairmen of other boards or committees acting in lieu of chairmen.] SEC. 487. Any drain commissioner may act under this chapter or under chapter 21, being sections 511 to 537, inclusive, of this act, by his deputy, under any and all circumstances. The vice-chairman or chairman pro tem of a county board of supervisors, or the vice-chairman of a board of county auditors or of a finance committee of a county board of supervisors, may act in lieu of the chairman of such board or committee, in event of the absence of such chairman from a meeting of the drainage board. (CL '48, § 280.487.)

§ 11.1488 Chapter deemed additional grant of power; inapplicability to completed drains.] SEC. 488. The provisions of this chapter shall be construed as an additional grant of power to that prescribed by other statutory provisions.

Projects completed prior to November 21, 1951, shall not be financed under this chapter.

(CL '48, § 280.488.)

§ 11.1489 Service of notices where incorporation of new city is incomplete; prior service in manner provided in section.] SEC. 489. Whenever a new city has been or shall be incorporated but such incorporation shall not have been completed by the adoption of a city charter, then any notice required by this chapter to be served upon the city clerk shall be served upon the clerk or clerks of the township or townships from which the city was incorporated: Provided,

That if a city charter shall have been submitted, but rejected by the electors, then such notice shall also be served upon the de facto officer of the city, if there be such an officer. Service of any notice made prior to the effective date of this amendment, which was made in the manner provided in this section, is hereby declared to be a valid compliance with the terms of this act in respect to service upon the city clerk. (CL '48, § 280.489.)

§ 11.1490 Special assessments, especially benefited lands; collections; disposition; application of section; alternate method of financing.] SEC. 490. If the legislative body of a public corporation which shall have been assessed under this chapter, shall determine that a part of the lands therein will be especially benefited by the drain project to the extent of any portion of the amount so assessed, then it may cause such portion to be assessed, according to benefits, against the especially benefited lands, provided such special assessment method of financing is not inconsistent with local financing policy as to similar drains and sewers. The assessment shall be made under the statutory or charter provisions governing special assessments in the public corporation insofar as they may be applicable, except that no petition shall be required from property owners. In the event the special assessments shall be levied, then all collections therefrom shall be used towards the payment of the assessment at large against the public corporation and each annual levy to be made for the payment of such assessment at large shall be reduced by the amount of money then on hand from special assessment collections available for such use. This section shall be applicable only where the drain assessment roll is confirmed subsequent to the effective date of this section. Nothing herein contained shall be construed to prevent the assessing of public corporations at

large under this chapter, it being the intention hereof to provide a method whereby a public corporation may raise moneys by special assessments as above provided where such procedure conforms with local practice. In lieu of levying special assessments, the public corporation under the same conditions and for the same purpose may exact connection charges to be paid by owners of land directly or indirectly connected with the drain project. (CL '48, § 280.490.)

(Title of Court and Cause)

MOTION FOR CLARIFICATION OF THE COURTS DETERMINATION

Now come the Plaintiffs by their attorneys, WILSON M. JACKSON and WILLIAM L. SANDERS, and move the honorable Court for a clarification of the determination of the Court heretofore made, showing unto the honorable Court as follows:

1. On June 19, 1963, the Honorable Thaddeus M. Machrowicz, United States District Judge, signed an Order to Show Cause directed to the Defendants, and each of them, relative to the issuance of a temporary injunction during the pendency of this cause.

2. Under date of June 24, 1963, the Defendant City of St. Clair Shores, members of the drainage boards, and the drainage districts, filed their "Statement on Behalf of Defendant City of St. Clair Shores, Members of Drainage Boards and Drainage Districts", wherein they allegedly showed cause why the prayer set forth in the Complaint for both interlocutory and permanent injunctive relief should be denied, and in which they alleged the Court was without jurisdiction in the matter because a plain, speedy and efficient remedy was available in the Courts of Michigan. These Defendants in their Statement alleged:

(a) The Complaint raised solely issues of the construction of the laws of the State of Michigan enacted under its police powers,

(b) The laws of the State of Michigan furnished easy and ample means for determination of legal issues, both statutory and constitutional arising from the Complaint,

(c) The matter in controversy did not exceed the sum or value of Ten Thousand ($10,000.00) Dollars and therefore jurisdiction was lacking;

(d) The Macomb County Circuit Court had assumed jurisdiction in two (2) pending actions over the duties and rights of the three (3) Defendant cities named in the Complaint;

(e) The suit in the Federal District Court was a collateral attack and interference with such pending state court suits;

(f) The Plaintiffs, as taxpayers, alleged no facts which gave them standing to test the validity of the Municipal Finance Act of the State of Michigan and other objections.

3. At a hearing held on June 25, 1963, it was determined that the temporary injunction should be denied and the Court upon request of Plaintiffs' counsel allowed until July 9, 1963, to answer the claims alleged by Defendants, and also allowed Defendants to present formal objections in the nature of a Motion to Dismiss;

4. On July 9, 1963, a hearing was held, after argument and briefs by both counsel, the Court, through the Honorable Clifford O'Sullivan, announced the position of the Court as follows:

> "Now, this is a matter of very great importance to the Plaintiffs as well as to the Defendants, and we have tried to give earnest consideration to the positions of both the parties, to all parties litigant, that are here today. Frankly, we wish that we could have more time for contemplative consideration of the legal points involved, but we think that this being

a matter of great public concern, in fact, it involves the public health of the persons who will be affected by what we do and therefore, we cannot give ourselves that opportunity to more quietly and leisurely consider the legal question. It is a matter of such emergency nature that prompt decision of it should be made. The affairs of several of the municipalities in Macomb County, Michigan, are involved, as well as the people of these municipal bodies and municipal divisions and the public health in the areas referred to may be impaired unless the projects now under attack are permitted to go forward without further delay. We think therefore without raising the writing of a formal opinion or memorandum we should announce at this should be made. The affairs of several of the municipalities in Macomb County, Michigan, are involved, as well as the people of these municipal bodies and municipal divisions and the public health in the areas referred to may be impaired unless the projects now under attack are permitted to go forward without further delay. We think therefore without raising the writing of a formal opinion or memorandum we should announce at this time our disposition of the case before us. We would thereupon the presentation of an order to that effect, dismiss the original as well as the Amended Complaint, both on our own motion, and upon the motion to dismiss that has been filed by the Defendants. To further expose our views in a memorandum that may be filed as quickly as it can be done but we do at this time announce our holding substantially as follows: WE FIND THAT BOTH THE ORIGINAL AND THE AMENDED COMPLAINT BEFORE

US DO NOT EITHER OF THEM STATE A CAUSE OF ACTION, WITHIN THE JURISDICTION OF THIS COURT NOR DOES IT STATE A CAUSE OF ACTION. Assuming the truth of whatever factual allegations are contained in the original and the Amended Complaint, we find that they do not disclose that any federally granted constitutional rights of Plaintiffs have been invaded, nor do we find that the Michigan statutes described in and attacked by the Complaint and the Amended Complaint in their operation as described in those, pleadings, invade or impair any of the Plaintiffs federally granted constitutional rights. Inasmuch as the matter is before us, we likewise find the opinion and find that the Michigan statutes mentioned under attack in the pleadings before us have not been employed, as described in the pleadings to offer any constitutional rights granted to these Plaintiffs by the Constitution of the State of Michigan. Now, on the question of this Courts' abstention from entering into a case which in our opinion, if it had merits to it, could have been presented and could be presented to the State Courts of Michigan. We feel that the ultimate objective of the Complaint and the Amended Complaint is to simply explain the assessment, levy and collection of taxes under the laws of the State of Michigan. Section 1341, Volume 28 of the U.S. Code, forbids a District Court of a United States District Court, from bearing any such restraint under the Federal Statutes. We are of the opinion that if there were any merit to the Plaintiffs' position, these Plaintiffs have a plain, speedy, and efficient remedy available in the Courts of Michigan."

5. At the end of said hearing, counsel for the Defendants presented to the Court an order for its approval, which order, plaintiffs believe to be in the file in this cause and of which Plaintiffs have never received a copy. Plaintiffs are informed that the last paragraph thereof reads as follows:

> "It is hereby further ordered, adjudged and decreed that the said Complaint and the Amended Complaint be and the same are dismissed for failure to state a claim upon which relief can be granted, with prejudice, and with no costs."

6. On July 16, 1963, the Honorable Thaddeus M. Machrowicz, United States District Judge, filed a document entitled "Opinion" in this matter, the original of which is believed to be in the file of this Court. This opinion appears to be a discussion of the issues of this case relative to the unconstitutionality of Chapter 20 of the Drain Code of 1956, and a determination that in fact, Chapter 20 of the Drain Code of 1956 was not unconstitutional.

7. Plaintiffs are preparing to take further action to seek the relief which they feel they are entitled to but are unable to do so because of what seems to be contradictory positions of the Court as announced by the Honorable Clifford O'Sullivan in the sentence as follows:

> "To further expose our views in a memorandum that may be filed as quickly as it can be done but we do at this time announce our holding substantially as follows: WE FIND THAT BOTH THE ORIGINAL AND THE AMENDED COMPLAINT BEFORE US DO NOT EITHER OF THEM STATE A CAUSE OF ACTION WITHIN THE JURISDIC-

TION OF THIS COURT NOR DOES IT STATE A CAUSE OF ACTION."

8. The position of the Plaintiffs is that a clarification of this matter is necessary to settle whether the suit was dismissed for lack of jurisdiction or whether it was dismissed upon the merits.

WHEREFORE, Plaintiffs pray this Court clarify its determination as to whether or not the matter was dismissed for lack of jurisdiction and the specific ground; or whether or not it was dismissed upon the factual, constitutional or statutory grounds.

Dated: July 23, 1963.

/s/ WILSON M. JACKSON
/s/ WILLIAM L. SANDERS
Attorneys for the Plaintiffs
132 Eastland Ctr., Prof. Bldg.
Harper Woods 36, Michigan
371-5111.

(Title of Court and Cause)

SUPPLEMENTAL OPINION

HONORABLE CLIFFORD O'SULLIVAN, Circuit Judge, 6th Circuit, HONORABLE THEODORE LEVIN, Chief District Judge, HONORABLE THADDEUS M. MACHROWICZ, District Judge.

Thaddeus M. Machrowivz, District Judge

This Court, on July 9th, 1963, entered an Order "that the said complaint and the amended complaint be, and the same are dismissed for failure to state a claim upon which relief can be granted, with prejudice and with no costs".

The said Order was preceded by an oral opinion in which the Honorable Clifford O'Sullivan, speaking for the entire Court, said, in part:

> "We think, therefore, without waiting the writing of a formal opinion or memorandum that we should announce at this time our disposition of the case before us . . .
>
> "We will, upon presentation to us, of an Order to that effect dismiss the original, as well as the amended complaint, both on our motion and upon the motion to dismiss that has been filed by the defendants.
>
> "We will further expose our views in a memorandum that may be filed as quickly as it can be done, but we do at this time announce our holding substantially as follows:
>
> "We find that both the original and the amended complaint before us do not, either of them, state a

cause of action, in the jurisdiction of the Court, nor do we state a cause of action."

Pursuant thereto, and after full and deliberate consideration this Court on July 16th, 1963, filed a written opinion in which the Court more fully elaborated its reasons for the finding and order of the Court on July 9th, 1963.

On July 25th, 1963, plaintiffs filed a "Motion for Clarification of the Court's Determination" noticing the hearing on said motion for August 5th, 1963, at 9:30 A.M.

Having fully considered plaintiff's motion for clarification, this Court re-affirms its order of dismissal and opinion, determining that the complaint and amended complaint are dismissed on their merits for failure to state a claim upon which relief can be granted.

THADDEUS M. MACHROWICZ
Thaddeus M. Machrowicz,
U. S. District Judge

Dated: at Detroit, Michigan this 5th day of August, 1963.
A TRUE COPY
JULIUS L. KABATSKY, Clerk
By Walter Bielski
Deputy Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FAIR DRAIN TAXATION, INC.,
a non-profit Michigan Corporation, et al.,
Appellants,

— vs. —

CITY OF ST. CLAIR SHORES,
a Michigan Municipal Corporation, et al.,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan,
Southern Division.

MOTION TO AFFIRM

JOHN H. YOE
2378 First National Building
Detroit 26, Michigan

CHARLES R. MOON
DICKINSON, WRIGHT, McKEAN & CUDLIP
Of Counsel
800 First National Building
Detroit 26, Michigan
Attorneys for Appellees

HE INLAND PRESS, DETROIT, MICHIGAN

INDEX

	Page
Statement	2
Argument	4
Conclusion	11
Appendix	14

CITATIONS

Cases:

Barker v. *Leggett* (D.C. Mo. 3 Judges), 102 F. Supp. 642, app. dism. 342 U.S. 900	9
Black Marsh Drainage Dist. v. *Rowe*, 350 Mich. 470	6, 7
Boules v. *Willingham*, 321 U.S. 503	5
Chesebro v. *Los Angeles County Flood Control*, 306 U.S. 459	8
Chicago, B & Q Ry. Co. v. *McGuire*, 219 U.S. 549	5
City of Madison Hts. v. *Twelve Towns Relief Drains Drainage Board*, 361 Mich. 522 (cert. den. 366 U.S. 919)	6
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541	4
Connor v. *Herrick*, 349 Mich. 201	6
Cummings v. *Garner*, 213 Mich. 408, 433, 182 N.W. 9, 17	7
Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112	4, 9
Green v. *Frazier*, 253 U.S. 233	4
Holland v. *Clerk of Garden City*, 299 Mich. 465	6
Holliday v. *Governor of South Carolina*, 78 F. Supp. 918, affd. 335 U.S. 803	9

	Page
Home Building & Loan Assn. v. *Blaisdell*, 290 U.S. 398	5
In Re Fitch Drain No. 129, 346 Mich. 639	6
In Re Petition of Macomb County Drain Comr., 369 Mich. 641	6
International Salt Company v. *Herrick*, 367 Mich. 160	6
Moore v. *Harrison*, 224 Mich. 512	6
Myles Salt Co. v. *Iberia, etc. Drainage Dist.*, 239 U.S. 478	8
Oakland County Drain Comr. v. *City of Royal Oak*, 306 Mich. 124	6
Packard Motor Car Co. v. *NLRB*, 330 U.S. 485	4
Phillips Petroleum Co. v. *Jones*, (D.C. Okla.) 147 F. Supp. 122	9
Railroad Commission v. *Pullman Co.*, 312 U.S. 496	8
Sheley v. *City of Detroit*, 45 Mich. 431	4
Twp. of Southfield v. *Drainage Board for Twelve Towns Relief Drains*, 357 Mich. 59	6
Valley Farms Co. v. *Westchester County*, 261 U.S. 155	8
West Virginia Motor Truck Assn. v. *Pub. Serv. Com.*, 123 F. Supp. 206, affd. 348 U.S. 881	8

Statutes and Court Rules:

Act No. 40, Michigan Public Acts of 1956, as amended, Sections 461 thru 490	3
Michigan Compiled Laws 1948, 1956 Supp. §280.461 thru §280.490	3
Mich. Stats. Ann. §11.1461 thru §11.1490	3

	Page
Michigan Rev. Stats. 1846, Chapt. 131	3
Rule 12, FRCP	10
Rule 12(b), FRCP	10
Rule 16, Paragraph 1(c), U.S. Sup. Ct. Rules	2
Rule 56, FRCP	10, 11
Rule 59(e), FRCP	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.....

FAIR DRAIN TAXATION, INC.,
a non-profit Michigan Corporation, et al.,
Appellants,

— vs. —

CITY OF ST. CLAIR SHORES,
a Michigan Municipal Corporation, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the Judgment Dismissing Complaint and Amended Complaint for failure to state a claim upon which relief can be granted entered by a three judge district court on July 9, 1962. (App. A22) The entry of this judgment followed the hearing by, and decision of, the district court on a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (App. A-1) filed by or adopted by all of the defendants in the district court, here the appellees. This Motion to Dismiss related to the allegations in the Complaint filed in the district court on behalf of some of the plaintiffs therein, now some of the appellants, on June 19, 1963, and to the allegations in the Amended Complaint (J.S. 19-48) filed on July 8, 1963, on behalf of all of the plaintiffs, now all of the appellants. It was conceded on behalf of the appellants at the hearing on the Motion to Dismiss that the Amended Complaint did not present any new substantial matters not already included in the original Complaint. (J.S. 55).

On June 19, 1963, when the Complaint was filed, the district court issued, at the request of the then plaintiffs, an order to show cause why a temporary injunction should not be entered against the defendants. This show cause order was heard by the three judge district court on June 25, 1963, and the issuance of a temporary injunction was denied. (J.S. 55; App. A23) On June 25, 1963, the district court set July 9, 1963, for consideration of the merits of the Complaint filed by the then plaintiffs, the plaintiffs being unwilling and unprepared to discuss the merits at the show cause order return date. (J.S. 55; App. A24).

The allegations in the Complaint and the Amended Complaint center around the validity and propriety of actions

taken or to be taken by the various defendants, which are alleged to be so taken on the authority of Chapter 20 of the Drain Code of 1956, as amended, of the State of Michigan. Said Chapter 20 is comprised of sections 461 thru 490 of Act No. 40 of the Michigan Public Acts of 1956, as amended. It is officially compiled as Compiled Laws 1948, 1956 Supp. §280.461 thru §280.490 and may be found in Mich. Stats. Ann. at §11.1461 thru §11.1490.

The reference to this statute in the Jurisdictional Statement on page 3 and the verbatim text thereof set forth beginning on page 63 are not complete and up to date. Following the enactment of Chapter 20 as part of Act No. 40 of the Michigan Public Acts of 1956, various parts of said Chapter were amended in 1957, 1959, 1961 and 1963. The amendments in 1963, which became effective on May 17, 1963, involved ten sections of said Chapter 20. None of these amendments, however, are material to the matters and issues considered by the district court on the basis of the allegations in the Complaint and Amended Complaint.

Said Chapter 20 of the Drain Code of 1956, as amended, of the State of Michigan is a re-enactment of the provisions added in 1953 to former drain legislation which originated in 1923 in the State of Michigan. The 1923 drain legislation in turn finds its antecedents going back to 1839 in the State of Michigan. (Rev. Stats. 1846, Chapt. 131.)

ARGUMENT

The district court characterized the action instituted by the plaintiffs, here appellants, as "vexatious in nature" (J.S. 56) and characterized the complaint and amended complaint, consisting of 52 paragraphs and 10 prayers, as a "shotgun amended complaint". (J.S. 61) The same defects apply to the recitation of the "Questions Presented" in the Jurisdictional Statement. (J.S. 3-6). Although the appellants list twelve questions presented by their appeal, there is in reality only one question presented. This single question is whether or not the Legislature of the State of Michigan acted wisely in enacting drain legislation for the state and, in particular, in enacting Chapter 20 of the Drain Code of 1956, as amended. This is not a question of judicial cognizance—not a subject of judicial review. *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112; *Green* v. *Frazier*, 253 U.S. 233; *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.

The appellants are in reality only saying that they do not like the method the legislature in Michigan chose, in Chapter 20 of the Drain Code of 1956, as amended, to construct and finance drains needed for the public health by one or more public corporations. They are saying that the legislature gave the public corporations too much power. Counsel for the plaintiffs stated to the district court that he could devise better legislation for this purpose than is found in Chapter 20.

One of the most frequently quoted judicial answers to this assertion of the appellants comes from an early Michigan case, In *Sheley* v. *City of Detroit*, 45 Mich. 431, Mr. Justice Cooley said:

> "The questions, then, are questions of legislative power. Whether this method of apportioning the cost of pavement or of repavement is equitable or just or politic, is in no way involved in this suit, and we should depart from our legitimate province if we were to volunteer an opinion upon it. The legislature, acting within the sphere of its powers in the making of laws, judges, and judges finally, upon all questions of policy and of equity. If the legislature declares the cost shall be collected by general levy, or on the other hand shall be levied upon abutting lots or their owners according to values, or to assessed benefits or to frontage, the determination binds us absolutely and conclusively, provided we discover no want of legislative authority. We must then address our attention to that point, and to that exclusively."

See also *Bowles* v. *Willingham*, 321 U.S. 503; *Chicago, B. & Q. Ry. Co.* v. *McGuire*, 219 U.S. 549; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398.

In an attempt to show a want of legislative authority and in an attempt to avoid the recognized unwillingness of the courts to review questions of legislative wisdom, the appellants alleged to the district court, and now describe as questions presented on this appeal, a number of generalized and spurious claims of constitutional violations. There were no disputed material facts presented to the district court because the Complaint and Amended Complaint allege no facts beyond the identity of the parties. These complaints contain only a series of allegations in the form of legal conclusions and legal assertions to the effect that there are constitutional defects in the statutes of the State of Michigan. (J.S. 19-52; 7-12)

The district court recognized at once the appropriateness of a motion to dismiss in this situation where no facts were

in dispute (J.S. 12 and 55) and the court was ready to consider the merits of the complaint at the time of the show cause hearing with respect to a temporary injunction (J.S. 55). The district court was anxious to get to a consideration of the generalized and spurious allegations of statutory defects because it could see that the plaintiffs, now appellants, were, by harassment and delay, attempting to block the use of legislation of the State of Michigan solely because these plaintiffs and appellants considered such legislation to be unwise. (J.S. 56)

The belief of the district court that the plaintiffs' and appellants' claims were vexatious and designed to harass and impede (J.S. 56) stemmed from the fact that the alleged defects in the Michigan drain legislation (which bore any relationship at all to sense and legal reality) have all been considered and passed on by the Michigan Supreme Court in a series of cases presented to it subsequent to the enactment of Chapter 20 of the Drain Code of 1956, as amended, or in cases prior thereto involving similar types of public improvements. (J.S. 54; 59-61) *Moore* v. *Harrison*, 224 Mich. 512; *Holland* v. *Clerk of Garden City*, 299 Mich. 465; *Oakland County Drain Comr.* v. *City of Royal Oak*, 306 Mich. 124; *In Re Fitch Drain No. 129*, 346 Mich. 639; *Connor* v. *Herrick*, 349 Mich. 201; *Black Marsh Drainage District* v. *Rowe*, 350 Mich. 470; *Twp. of Southfield* v. *Drainage Board for Twelve Towns Relief Drains*, 357 Mich. 59; *City of Madison Hts.* v. *Twelve Towns Relief Drains Drainage Board*, 361 Mich. 522 (cert. den. 366 U.S. 919); *International Salt Company* v. *Herrick*, 367 Mich. 160; *In Re Petition of Macomb County Drain Commissioner*, 369 Mich. 641.

In the last cited case, involving two of the defendant-appellee drainage districts in this appeal, Mr. Justice Black

had the following to say about Chapter 20 of the Drain Code of 1956, to-wit:

> "Proceedings under chapter 20 are special and summary. In the nature of their purpose such proceedings must so advance, provided due notice and opportunity to be heard are supplied, as they were here. Much in the way of quasi-legislative and quasi-judicial authority is vested by law[3] in the appointed drainage board with indicative corollary that, to the extent its doings are reviewable only within the limits of the constitutional writ of certiorari (see section 483), so must the legislatively provided quasi-judicial powers of the board be deemed enlarged.
>
> "Sections 467 through 469 of chapter 20 provide little light upon the hearing duties and functions of the drainage board. We are not advised of legislative intention that the board may or should administer oaths and hear the testimony of sworn witnesses. Our decisions, however, fill such crevices as are necessary for determination of the questions brought into circuit by the writ. We turn to them for adoptive analogies.
>
> "[1, 2] In another thoughtfully analyzed special assessment case this Court summed up its previous holdings in these words (*Cummings* v. *Garner*, 213 Mich. 408, 433, 182 N.W. 9, 17):
>
> > 'It is the province of the Legislature, directly or by delegation, to establish the special assessment district, determine the amount of the special assessment, and the rule of apportionment. Where the rule of apportionment is according to the special benefits derived, the application of that rule may

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[3] Chapter 20 was found constitutional, as against presented constitutional questions, in *Black Marsh Drainage Dist.* v. *Rowe*, 350 Mich. 470, 87 N.W. 2d 65.

> be effected by the employment of any method which will accomplish that purpose, whether it be by valuation, frontage, superficial area, or any other method which does not lose sight of the fundamental basis of special assessments for local improvements. The authorities abundantly support this conclusion. If the determination of the rule is within the recognized power of the Legislature, then, how that rule shall be applied is clearly within its authority.' "

The Supreme Court of Michigan has clearly decided that the delegation of legislative, administrative and judicial powers to the defendant drainage districts and their drainage boards is constitutional under the Constitution of Michigan and the due process of law and equal protection of the law clauses thereof. No further or different questions were presented to the district court under the Constitution of the United States. *Myles Salt Co.* v. *Iberia, etc. Drainage Dist.* 239 U.S. 478; *Valley Farms Co.* v. *Westchester County*, 261 U.S. 155; *Chesebro* v. *Los Angeles County Flood Control*, 306 U.S. 459.

The import of the foregoing comments is not only that the Michigan Court, in other cases, has decided the constitutional issues asserted by appellants. The true importance, and the great importance, of the foregoing comments is that when the correct construction of the provisions of Chapter 20 of the Drain Code of 1956 adopted by the Michigan Courts (which is binding on the Federal Courts, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; *West Virginia Motor Truck Assn.* v. *Pub. Serv. Com.*, 123 F. Supp. 206, affd. 348 U.S. 881) is substituted for the spurious and false construction urged by the appellants, there are no Federal Constitutional questions left for decision. The

Federal Courts will not adopt a statutory construction opposed to that adopted by a State Court in order to create a Federal Constitutional question. *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112; *Holliday* v. *Governor of South Carolina*, 78 F. Supp. 918, affd. 335 U.S. 803; *Barker* v. *Leggett*, (D.C. Mo. 3 Judges) 102 F. Supp. 642 app. dism. 342 U.S. 900; *Phillips Petroleum Co.* v. *Jones*, (D.C. Okla.) 147 F. Supp. 122. This is what these appellants were asking the district court to do.

The foregoing discussion and the opinion of the district court referred to therein and the other court decisions cited therein, demonstrate clearly that the questions presented by the appellants numbered 5 thru 12 (J.S. 4-6) are so unsubstantial as not to need further argument. These questions numbered 5 thru 12 are the only questions presented by appellants which were ruled on by the district court.

The questions numbered 1 thru 4 (J.S. 3 and 4) of the questions presented by the appellants were not considered or ruled on by the district court. As to Questions 1 and 2 (J.S. 3 and 4) it is clear from the record that the judgment entered by the district court (App. A22) is fully supported by the Opinion of the district court (J.S. 54) and vice versa. Remarks made by members of the district court during the course of hearing arguments and before entry of the judgment and rendering of the opinion (App. A23 and A27) must be held to be merged in these two documents which represent the final action of the district court. The appellants made no motion to alter or amend the judgment. (Rule 59(e)) It appears that the appellants are not aware that a Judgment Dismissing Complaint and Amended Complaint for failnre to state a claim upon which relief can be granted is a judgment on the merits of the claim or claims

asserted in such complaints. Since such a judgment is a decision on the merits, it is not only appropriate, but necessary, that any opinion rendered following entry of this judgment should consider the merits of the plaintiffs' and appellants' claims. (Question 1) Such a judgment and opinion on the merits in *res judicata* of the meritorious issues raised and decided by the filing and dismissal of the complaints (Question 2).

As to Questions 3 and 4, the appellants do not correctly apprehend that the filing, hearing and granting of a motion to dismiss for failure to state a claim upon which relief can be granted is "a trial of the case on its merits" (Question 3, J.S. 4). It is just as much a trial of the case on its merits as is a jury trial. Such a trial by motion to dismiss, which is granted, results in just as much of a judgment on the merits as does the verdict of a jury and the judgment based thereon. (App. A34)

The defendants, now appellees, made no motion for summary judgment but made a motion to dismiss. This motion to dismiss was made, as is required by Rule 12 of the Federal Rules of Civil Procedure, before the defendants filed answers to the Complaint. The filing and time for hearing a motion to dismiss are governed by the provisions of Rules 6(d) and 12(b) and not by the provisions of Rule 56 pertaining to summary judgments. Rule 12(b) refers to Rule 56 only as to disposition of a motion to dismiss, such as by a partial judgment or by a finding of no genuine issues of a material fact. The appellants claim that no discretion exists under Rule 56 as to the 10 day notice requirement. This may be true, but Rule 12(b) directs the district court to exercise its discretion in giving "reasonable opportunity to present all material".

At any rate, Question 4 presented by appellants (J.S. 4) is a moot question because there were no factual issues, genuine or not, presented by the Complaint and Amended Complaint and because the appellants offered no material and made no request for an opportunity to present material which was denied to them. Even under the provisions of Rule 56, the appellants would have had to present their material "prior to the day of hearing" which for a motion served on July 1, 1963, would mean July 9, 1963, and on this day the appellants were allowed to present any and all material they desired, including a 52 paragraph, 10 prayer, Amended Complaint, filed July 8, 1963, but presented to defendants and appellees on July 9, 1963, just prior to the hearing on the Motion to Dismiss. (App. A29)

Again it must be asserted that the Questions Presented by appellants, numbered 1 thru 4, as well as questions numbered 5 thru 12, are so unsubstantial as not to need further argument.

CONCLUSION

Attached to the complaint filed by plaintiffs and appellants on June 19, 1963, as an exhibit, was a copy of the Official Notice of Sale of Martin Sanitary Diversion Drain Bonds, as published in the newspapers in Macomb County, Michigan. (J.S. 39) This notice of sale called for the receipt of bids for the bonds on June 20, 1963, the next day. The district court knew that the mere filing of this action on June 19, 1963, attacking the validity of Chapter 20 of the Drain Code of 1956, as amended, had the same effect as a temporary injunction in preventing this bond sale scheduled for June 20, 1963, and in preventing the sale in Michigan of any other drain bonds authorized pursuant to said Chapter

20. Plaintiffs and appellants alleged that the drain projects underway in Macomb County alone had an aggregate estimated cost of fifty million dollars. (J.S. 21 & 38) The district court knew, as stated in its opinion, (J.S. 56) that the mere pendency of this action served to hold up the financing of all of these public health drain improvements, as well as other similar projects throughout the State of Michigan.

The pendency of this action on appeal still serves to block the financing of all so-called Chapter 20 drain projects in Michigan.

The fact that the basis of the attacks made on the validity of Chapter 20 had already been considered and rejected by the Michigan Courts, and the fact that such attacks were so general and so contrived as to be completely unsubstantial, convinced the district court, correctly, that as speedy and as complete a disposition of this action should be made as was consistent with justice. (App. A31) The same considerations apply in urging that this Motion to Affirm be granted, thus bringing an end to this vexatious litigation and removing the injunctive effect of its pendency.

The district court gave serious and extensive consideration to all allegations and all arguments advanced by the plaintiffs and appellants and reviewed and analyzed all authorities pertinent to all of the issues involved in this action, no matter how unsubstantial. The decision of the district court is correct and this appeal presents no question warranting plenary consideration by the Supreme Court of the United States. The judgment of the district court should be affirmed.

Counsel for all defendants in the district court, now appellees here, have authorized the statement that they

join in this Motion to Affirm on behalf of their respective clients.

Respectfully submitted,

John H. Yoe
Charles R. Moon

November, 1963.
Dickinson, Wright, McKean & Cudlip,
Of Counsel.

APPENDIX

TABLE OF CONTENTS

Page

Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted 15

Judgment Dismissing Complaint and Amended Complaint 22

Remarks of District Court at Hearing on Order to Show Cause on June 25, 1963 23

Remarks of District Court at Hearing on Motion to Dismiss on July 9, 1963 27

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The defendants, City of St. Clair Shores, Thomas S. Welsh, Macomb County Drain Commissioner, Bernard A. Kalahar, Chairman of the Macomb County Board of Supervisors, Frank Biehl, Chairman of the Finance Committee of the Macomb County Board of Supervisors, and each Drainage District, a body corporate, for the 12 drains named in the Complaint, hereby assert that the said Complaint fails to state a claim upon which relief can be granted and therefore move to dismiss said Complaint for the following reasons and grounds, to-wit:

A. There are no rights of the plaintiffs, as alleged, guaranteed to them by any provision of the Constitution of the United States or by the Constitution of the State of Michigan, as taxpayers in the City of St. Clair Shores or as citizens of the City of St. Clair Shores, to vote on the proposition as to whether or not the City of St. Clair Shores may approve, execute and file a petition pursuant to Sections 463, 482, 485 and 486 of the Drain Code of 1956, nor to vote on the proposition of the assessing against the City of St. Clair Shores by the defendant drainage boards of a portion of the cost of each drain project pursuant to Sections 473, 474, 475, 477 and 478 of said Drain Code.

B. There are no rights guaranteed to the plaintiffs, as alleged, as taxpayers in or citizens of the City of St. Clair Shores, guaranteed to them by the Constitution of the United States or by the Constitution of the State of Michigan to vote on the question of whether or not the tax limitations of the City of St. Clair Shores shall be

increased or otherwise changed by reason of the assessment against said city of portions of the cost of each drain project or by reason of the obligation of the city to levy a tax to raise money to pay said assessment, and the plaintiffs have not alleged nor is it the fact that the City of St. Clair Shores will tax in any amount or at any rate beyond or in excess of the 15 mill tax limitation and after January 1, 1964, under the new Constitution of the State of Michigan, there will be no tax limitation applicable to taxes levied to pay Chapter 20 bond obligations.

C. None of the defendant drainage districts and none of the drainage boards therefor and none of the defendants, other than the City and the County, have or claim any right to levy taxes against the property of any of the plaintiffs and, therefore, no question as to the violation of rights of the plaintiffs guaranteed by either the Constitution of the United States or the Constitution of the State of Michigan are violated by a taxing power which does not exist.

D. The legislature of the State of Michigan has the power to delegate to the City of St. Clair Shores and to the defendant drainage boards and drainage districts the legislative and judicial powers which are delegated to each of them pursuant to the Drain Code of 1956 and none of the delegations of such powers set forth in the Drain Code of 1956 violate any rights of the plaintiffs guaranteed to them by either the Constitution of the United States or the Constitution of the State of Michigan and the plaintiffs have alleged no such rights which are violated by any such delegations of powers set forth in the provisions of said Chapter 20 of the Drain Code of 1956.

E. The provisions of the Drain Code of 1956, set forth

in Sections 474, 475, 477 and 490, providing for the assessment of part of the cost of each of the 12 drain projects against the City of St. Clair Shores and requiring the city to levy a tax upon all of the real and personal property of the plaintiffs subject to ad valorem taxation and allowing the council of the city to cause part of said costs to be assessed according to benefits, if such special assessment method of financing is not inconsistent with city financing policy as to similar drains and sewers, or, in lieu of levying special assessments, permitting the city to exact connection charges for connection to each drain project, do not deprive the plaintiffs of property without due process of law and do not deny to the plaintiffs the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

F. The provisions of the Drain Code of 1956, set forth in Sections 467 and 469, providing for notice of the time and place when and where each drainage board will meet to hear any objections to the proposed drain and the petition therefor and to the matter of assessing the cost of such drain to the City of St. Clair Shores and providing for notice of the time and place when and where each drainage board will meet and hear any objections to the apportionments of cost of each drain against the City of St. Clair Shores, do not deprive the plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; and the absence of any requirement in the provisions of Chapter 20 of the Drain Code of 1956, for individual notice of said meetings to each of the plaintiffs, does not deprive the plaintiffs of property without due process of law; and the notice requirements set forth in the said Sections 467 and 469 are adequate and complete.

under applicable Federal and Michigan constitutional requirements of due process of law, for the establishment and levying of assessments against the City of St. Clair Shores, at large, and not against the individual properties of the plaintiffs; and the plaintiffs have not alleged that they did not receive actual notice of said meetings and that they did not attend said meetings.

G. The plaintiffs have neither alleged in what manner and to what extent there has been any injury or damage or jeopardy to their rights, as owners of property and taxpayers in the City of St. Clair Shores, arising out of the alleged arbitrary nature of proceedings pursuant to Chapter 20 of the Drain Code of 1956 or arising out of the alleged failure of the provisions of said Chapter 20 to contain safeguards, controls, guides or standards; nor have they alleged in what manner and to what extent the provisions of the said Chapter 20 and the actions of the defendants thereunder have violated any rights of the plaintiffs guaranteed by the Constitution of the United States or on what occasion and in what manner any decisions were made or actions taken by the defendants which caused such injury, damage, jeopardy or violation with respect to the property of the plaintiffs as taxpayers in the City of St. Clair Shores; nor have the plaintiffs alleged that any such actions or decisions of said defendants were wrong or were taken in spite of or against the protests or objections of the plaintiffs; nor have the plaintiffs alleged any facts or set forth any claims which overcome the presumption that the actions of the duly elected and appointed officials of the City of St. Clair Shores have been lawful and proper and in the best interests of the said city, of plaintiffs and of all other property owners, taxpayers and citizens in said

city in connection with the several Chapter 20 drain projects.

H. The plaintiffs have not alleged any valid grounds or standing for making a Complaint against the defendants, City of East Detroit, City of Roseville, the Honorable John C. Mackie, State Highway Commissioner of the State of Michigan, and the Michigan Municipal Finance Commission, and have not alleged any actions by any one or all or any combination of said defendants which have caused injury to or have damaged or jeopardized the interests or rights of the plaintiffs as property owners and taxpayers in the City of St. Clair Shores and the County of Macomb, and the full faith and credit of the State of Michigan is not pledged in payment of bonds issued or to be issued pursuant to Chapter 20 of the Drain Code of 1956, as amended.

I. The plaintiffs have neither alleged any actions by any defendants which have the effect of regulating or burdening interstate commerce in violation of Article 1, Section 8(3) of the Constitution of the United States nor have they alleged the manner in which the provisions of the Drain Code of 1956 and or the Municipal Finance Act regulate, attempt to regulate, or in any manner impose a tax or other burden upon interstate commerce in violation of said constitutional provision nor have they alleged any injury or damage or jeopardy to any rights of the plaintiffs in interstate commerce arising out of their alleged standing as property owners and taxpayers in the City of St. Clair Shores and the County of Macomb; and plaintiffs admit the drains are public health projects which brings them within the police power of the state and county and of each city.

J. The plaintiffs have not made any allegations which

show or tend to show that the Complaint should not be dismissed because of laches of the plaintiffs and because of their having waived, and now being estopped to assert, the right to contest the validity of the actions of the drainage board for each of the drains named as defendants herein and the actions of the City of St. Clair Shores and the County of Macomb relating to the creation and processing of said drain projects.

K. The plaintiffs have not alleged a want of authority on the part of the intra-county drainage boards to establish and construct the projects complained of, and in the absence thereof are relegated to assert their rights within the time provided by Section 483 of the Drain Code of 1956, as amended.

L. The plaintiffs claim a constitutional doctrine of separation of powers which is allegedly violated by the provisions of the Drain Code of 1956, as amended, through the delegation to the several defendant drainage boards of alleged legislative, administrative and judicial powers but do not allege how such delegations are a violation of the Constitution of the United States in light of the fact that the courts of the State of Michigan have found that the delegations of power contained in Chapter 20 of the Drain Code of 1956, as amended, are not violative of any provisions of the Constitution of the State of Michigan.

M. Plaintiffs allege a violation of the full faith and credit provisions of the Constitution of the United States as set forth in Section 1 of Article IV, but do not allege in what manner and to what extent any of the defendants have failed to give full faith and credit to the public acts of any state and in fact the plaintiffs appear to base their Complaint upon the fear that persons other than the

defendants will give full faith and credit to the public acts of the defendants in compliance with the said Constitution.

N. The plaintiff, Fair Drain Taxation, Inc., a Michigan nonprofit corporation, is not a taxpayer in any of the public corporations involved in the proceedings to establish any of the drains by the defendant drainage districts and has no standing or right to be a plaintiff in this Complaint on the basis of the allegations set forth therein.

This motion is based upon the files and records in this Court and cause and the affidavits and exhibits hereto attached and the statements, memoranda and other material submitted to this Court at the hearing held on June 25, 1963.

Dated: July 1, 1963

John H. Yoe
2378 First National Building
Detroit 26, Michigan
WOodward 3-7077

Dickinson, Wright, McKean & Cudlip
By Charles R. Moon
800 First National Building
Detroit 26, Michigan
WOodward 2-5860

(AFFIDAVITS AND EXHIBITS EXCLUDED WITH CONSENT OF DEFENDANTS' COUNSEL IN OPEN COURT AT TIME OF HEARING ON MOTION TO DISMISS ARE NOT REPRODUCED HERE.)

JUDGMENT DISMISSING COMPLAINT AND AMENDED COMPLAINT

At a session of said Court held in the Courtrooms in the Federal Building in the City of Detroit, Michigan, this 9th day of July, 1963.

Present, Honorable Clifford O'Sullivan,
Circuit Judge, United States Court of Appeals for the Sixth Circuit,
Honorable Theodore Levin,
Chief District Judge,
and
Honorable Thaddeus M. Machrowicz,
District Judge.

This matter having come on to be heard on a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, filed on behalf of defendants on July 1, 1963, and noticed for hearing on July 9, 1963, and the Plaintiffs having filed an Amended Complaint on July 8, 1963, which Amended Complaint and the Complaint filed in this civil action on June 19, 1963, have been examined and considered by this Court in the light of the said motion to dismiss and the briefs and arguments of counsel and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Amended Complaint filed in this civil action on July 8, 1963, presents no new issues of law not already set forth in the Complaint and alleges no new facts

which are material or relevant or which present a genuine issue as to a material fact.

IT IS HEREBY FURTHER ORDERED, ADJUDGED and DECREED that the said Complaint and Amended Complaint be and the same are dismissed for failure to state a claim upon which relief can be granted, with prejudice, and with no costs.

CLIFFORD O'SULLIVAN
Circuit Judge
THEODORE LEVIN
Chief District Judge
THADDEUS M. MACHROWICZ
District Judge

A TRUE COPY
JULIUS L. KABATSKY, Clerk
BY: ROSEMARY MILLER, Deputy Clerk
(Tr-3)

Detroit, Michigan
Tuesday, June 25, 1963

• • •

(Recess.)

JUDGE O'SULLIVAN: The Court feels that at this time it should dispose of the matter that is before the Court today, namely, the application for a preliminary injunction.

As to that, the Court is of the mind, and it will be the Court's order that the application for injunction is denied.

I think it is not necessary that we extensively discuss the reasons therefor. It is rather clear to us that under Section 1341 of the Judicial Code we should not enjoin the collection of state taxes or interfere with the imposition of taxes, if there is a plain, speedy and adequate remedy within the

state courts. We are impressed that that is the situation here, and that alone would permit us and urge us to deny an injunction at this time, and so it is our order at this time that the application for injunction be and it is denied.

Now, further matters have been suggested to us relating to the dismissal of the complaint that is before us.

Mr. Jackson advised us that he did not come here today prepared to consider the matter of the motion to dismiss and was not prepared to argue it.

Frankly, we entertain grave doubts, apart from Section 1341, of the jurisdiction of this Court of the litigation that (Tr-4)
is presented by the complaint. We of course have the right, wholly without the filing of a motion to dismiss, to dismiss the cause at any time if the Court is without jurisdiction. We frankly have grave doubts as to whether this Court has any jurisdiction. And to be fair to counsel for both parties, we likewise, at this moment at least, and upon the basis of the complaint and the representations that have been made, are doubtful whether the complaint, as presented, states a cause of action for equitable relief. We think this litigation should be promptly disposed of. It involves matters of very important public concern to the welfare of the people of the various municipalities involved, and the litigation should be promptly disposed of.

If a motion to dismiss is made, this Court will hear it with as much dispatch as is possible, having in mind the rights of the litigants to be heard on it. It happens that the engagements of the members of the panel that are hearing this case are such that the earliest that a motion to dismiss could be heard, if one is made, would be probably on July 9th because one member of the panel has engagements that prevent him from being available for an earlier hearing.

But if that is to be the course of the case, we would want all motions and responses thereto to be made promptly with any memoranda of legal authorities so that the case could be noticed for hearing not before July 9th, at 1:30 in the afternoon, which would make it possible for this panel to

(Tr-5)

meet here and consider it.

So that as far as the hearing today is concerned, we will deny the motion for a temporary injunction. It is denied, and an order confirming that ruling of the Court may be presented for signature and we will await further action on the matters I have discussed, as to the dismissal of the complaint on various grounds, if that matter comes before us.

That will be the disposition today.

Is there anything that any counsel wishes to state to the Court, either for the plaintiffs or for the defendants?

MR. MOON: If your Honor please, we will file a motion to dismiss for that day, if we may consider that as the available time, July 9th, at 1:30.

JUDGE O'SULLIVAN: I think whatever you do must be done in sufficient time so that the plaintiff will have full time and opportunity to make whatever response to any motion he may wish, and any briefs that are filed with memoranda should be in the Court's hands at least forty-eight hours before that time.

So I think you all understand our time schedule and will accommodate yourselves to it.

MR. MOON: Will the Court consider this as continued, or does the Court want again urged the jurisdictional question under Section 1341, and the amount in controversy?

JUDGE O'SULLIVAN: Well, let me say this: that in

(Tr-6)

some instances the courts have, relying on Section 1341, denied the injunction, retaining jurisdiction.

It may be that the cause may be dismissed without prejudice, unless the Court is satisfied that there is no jurisdiction or that the Bill itself contains no equities. Those are matters even distinct from Section 1341.

MR. MOON: Then as I understand the Court, this Court has held that even a declaratory judgment would not be granted when blocked by Section 1341, so that the injunction itself is not the sole problem, as far as Section 1341 is concerned.

JUDGE O'SULLIVAN: We realize that in this instance the whole direction and thrust of the complaint is for injunctive relief against the imposition of taxes, so that that is what is involved. But Section 1341, in some views, has been employed to deny an injunction at the moment, but holding jurisdiction to see whether or not the persons who have come to us are accorded a proper remedy in the state court, and if it is denied there the case is still before the Court.

What I am trying to say is that there may be other grounds that could be considered in this case which have been discussel here today. But, as Mr. Jackson said, he did not come here today to discuss those questions, and we don't think there should be a premature ruling on those things when counsel has said he did not come here to discuss it and was not prepared to discuss it.

(Tr-7)

Very well, gentlemen.

MR. JACKSON: Thank you very much, your Honor.

We will have the right to amend our pleadings if we so elect; is that correct, your Honor?

JUDGE O'SULLIVAN: I cannot rule on anything

ahead of time that is not before us in that regard.

MR. JACKSON: Thank you very much.

MR. MOON: Thank you.

(End of hearing.)

(Tr-8)

COURT REPORTER'S CERTIFICATE

I, Carl J. Pitt, do hereby certify that I, by means of a stenomask, reported the foregoing proceedings in Civil Action No. 24000, entitled FAIR DRAIN TAXATION, INC., et al, v. CITY OF ST. CLAIR SHORES, et al, before the Honorable Clifford O'Sullivan, Circuit Judge, Honorable Theodore Levin, Chief District Judge, and Honorable Thaddeus M. Machrowicz, District Judge, sitting en banc, at Detroit, Michigan, on June 25, 1963; that the foregoing and attached seven (7) typewritten pages are a true and correct transcript of that portion of my records then and there made of said proceedings.

Carl J. Pitt
Official U. S. Court Reporter
739 Federal Building
Detroit 26, Michigan
WOodward 1-9177

Dated: June 26, 1963.

(Tr-3)

Detroit, Michigan,
Tuesday, July 9th, 1963

* * *

(Recess.)

JUDGE O'SULLIVAN: I think I should say for the panel of this Court that is hearing this that we have a procedural question here that has given us some concern, but

we think we have arrived at the right way in which to handle it, and I think it important that we make a record of the background of the case insofar as it affects this procedural question.

This matter first came on for hearing upon the Plaintiffs' application for a temporary injunction and it is my recollection that that hearing was held on June 25th. A full hearing was had on the question of injunction. But, necessarily, in the discussion of the question of injunction the merits of the case were discussed at length. At that time the Court seriously questioned whether we had any jurisdiction, from the standpoint of the amount involved and for other reasons then discussed.

We considered at that time the possibility that the case might be dismissed on the Court's own motion and that necessarily would have disposed of the question of the temporary injunction.

Also, those things involving the merits of the case were discussed at considerable length by both the plaintiffs (Tr-4)
counsel as well as the counsel for the defendants. It was our thought at that time that we might consider the question of the sufficiency of the complaint from several standpoints—not only jurisdiction, but the merits of the case.

However, plaintiffs' counsel asked the Court not to get into that subject at that time because they had come here prepared only to discuss the question of injunction and were not prepared to argue the merits of the complaint and the question of whether it was subject to dismissal.

Because of that request of plaintiffs' counsel, the Court decided to defer consideration of it and at that time set July 9th as the date when we would hear a motion to dismiss. It was in the contemplation of everyone at that time

that a formal motion to dismiss would be promptly presented and served. That was done, and a notice for the date which we have set, namely, this date, July 9th, at 1:30 o'clock.

In the interim, plaintiffs' counsel spoke to one of the members of the Court as to an extension of time or an adjournment of this motion so that they might give further consideration to the motion to dismiss.

With that in mind, it just happened that I was here in Detroit and Judge Levin was here and we met with counsel for the plaintiffs and one of the counsel for the defendants, the counsel who has carried the principal burden of the presentation to the Court. We had an informal discussion in chambers, at the conclusion of which we advised plain-
(Tr-5)
tiffs' counsel that this was a matter of such exigency and emergency that we thought the matter should go forward today.

Within the last twenty-four or forty-eight hours the plaintiffs presented an amended complaint.

Frankly, it was this panel's impression that we should allow the amended complaint and we assumed at that time that it would be considered as a pleading involved in the matters we were going to discuss today, and we did allow the amended complaint to be filed without a motion therefor or without notice to the defendants, and then the Court announced it was the Court's intention that the motion to dismiss which has been filed would be considered as applying to the amended complaint as well as to the original complaint. And, actually, I assumed that upon the allowance of the amended complaint, and the filing of it, the original complaint no longer was a pleading in this case. However, plaintiffs' counsel objected to proceeding at this

time either on the original complaint or amended complaint, bottomed upon their contention that the motion made was equivalent to a motion for summary judgment, and therefore sufficient time had not been given of the presentation of the motion; secondly, that no notice had been given of a motion to dismiss the amended complaint.

The motion to dismiss the amended complaint was made in open court at the beginning of this hearing. (Tr-6)

This Court made inquiry of plaintiff's counsel, as well as making its own examination of the amended complaint, and both by the response made to the Court's questions and by the Court's own examination it appears to us that the amended complaint presents nothing of substance that was not presented by the original complaint. The thrust of both complaints is the unconstitutionality of certain Michigan statutes and their unconstitutional use by certain public officers.

In view of that background, it was the order of the Court that we would hear the motion to dismiss the amended complaint forthwith as a part of the hearing today, and that remains, of course, our order. We are satisfied that no inequity has been visited upon plaintiff's counsel by our so proceeding, because all of these matters have been discussed in the briefs that have been filed, covering all of that. So, procedurally, we are hearing the motion to dismiss the amended complaint.

This is a matter of very great importance to the plaintiffs as well as to the defendants, and we have tried to give earnest consideration to the positions of all of the parties that are here before us today.

Firstly, we wish that we could have more time for our contemplative consideration of the legal points involved,

but we think, this being a matter of great public concern, —in fact it involves the health of the persons who will be (Tr-7)
affected by what we do, and therefore we cannot give ourselves that opportunity to more quietly and leisurely consider the legal questions. It is a matter of such emergency nature that prompt decision of it should be made. The affairs of several municipalities of Macomb County, Michigan are involved, as well as the people of those municipal bodies, the municipal divisions. And the public health within the areas referred to may be impaired unless the projects now under attack are permitted to go forward without further delay.

We think, therefore, without awaiting the writing of a formal opinion or memorandum that we should announce at this time our disposition of the case before us.

We will, upon a presentation to us of an order to that effect, dismiss the original as well as the amended complaint, both on our own motion and upon the motion to dismiss that has been filed by the defendants.

We will further expose our views in a memorandum that may be filed as quickly as it can be done, but we do at this time announce our holding substantially as follows:

We find that both the original and the amended complaints before us do not, either of them, state a cause of action, within the jurisdiction of this Court, nor do they state a cause of action.

Assuming the truth of whatever factual allegations are contained in the original and the amended complaint, we (Tr-8)
find that they do not disclose that any Federally granted constitutional rights of the plaintiffs have been invaded, nor do we find that the Michigan statutes described in and

attacked by the complaint and amended complaint, in their operation as described in those pleadings, invade or impair any of the plaintiffs' Federally granted constitutional rights.

Inasmuch as the matter is before us, we likewise are of the opinion and find that the Michigan statutes mentioned and under attack in the pleadings before us, we find that neither as adopted by the Michigan legislature, nor as they have been employed, as described in the pleadings before us, offend any constitutional rights granted to these plaintiffs by the Constitution of the State of Michigan.

Now on the question of this Court's abstention from entering into a case which in our opinion, if it had merit to it, could have been presented and could be presented to the State courts of Michigan.

We feel that the ultimate objective of the complaint and amended complaint is to restrain the assessment, levy or collection of taxes under the laws of Michigan.

Section 1341 of Title 28, United States Code, forbids a United States District Court from granting any such restraint under the circumstances here, because we are of the opinion that if there were any merit to the plaintiffs' position, these plaintiffs have a plain, speedy and efficient (Tr-9)
remedy available in the courts of Michigan, to vindicate the same rights they claim are involved in the case they had started in this Court.

Our dismissal of the amended complaint necessarily disposes of the application for injunctive relief, as any injunction, had it been granted as a preliminary injunction, would fall with the dismissal of the amended and original complaint.

Repeating that we regret we cannot spend more time con-

sidering this. We very much appreciate the presentation that has been made to us by plaintiffs' counsel, representing their clients, which is an important matter to them; it is likewise of great public importance to the people who make up the municipal areas involved. And so we feel we should dispose of the case by a formal order very promptly and we will supplement that formal order with as much promptness as we can possibly employ by a memorandum opinion more extensively exposing the reasons why we do as we do.

But it will be the order of this Court that the case will be dismissed and the defendants' counsel may present for signature to this Court an order dismissing the amended complaint which, having been allowed, takes the place of the original complaint; and, because of the exigencies involved, we say that that order should be presented to Judge Machrowicz of this court on Thursday of this week at (Tr-10)
eleven o'clock in the forenoon, but that the copy of it be delivered to the plaintiffs' counsel not later than two o'clock tomorrow afternoon.

We certainly are moving very rapidly, gentlemen, but we feel that the public interest requires this dispatch.

MR. MOON: May it please the Court, I have prepared an order, because of the exigencies as noted by the Court, in the hope that a simple order dismissing the complaint and amended complaint could be entered, which I have here.

I have a hearing at ten o'clock in Oakland County before Judge Arthur E. Moore on Thursday, which has been set for some little time now, and I have to attend.

JUDGE O'SULLIVAN: Has the plaintiff seen the proposed order?

MR. MOON: No, sir. I will be glad to present it to him.

JUDGE O'SULLIVAN: If you will present him with the proposed order.

(Intermission while Court and counsel study the proposed order.)

JUDGE O'SULLIVAN: Would counsel for the plaintiffs care to address the Court on the form of this order?

MR. SANDERS: The form looks like a nice form. The objection would be as to the contents, as to one part, and that would be in the last paragraph thereof.

(Tr-11)

I do not remember hearing the Court saying that this would be "dismissed with prejudice and with costs."

JUDGE O'SULLIVAN: We didn't specifically cover that, but I said that I think that all of the members of the panel have already noticed the question of costs, and it would be our disposition to strike that from it. This is a public question, and at least I think we would exercise our discretion to eliminate that. I think the question "with prejudice," however, should remain, because we have indicated we are dismissing it on the merits.

MR. SANDERS: If that is the decision of the Court, then we will abide by the decision of the Court.

JUDGE O'SULLIVAN: And this disposition of the Court obviates any further procedure we have talked of.

So this order as presented, striking out the last phrase "and with costs to all defendants" shall be eliminated; otherwise, it shall be signed, if presented.

Judge Levin calls my attention to the fact that a dismissal might carry costs. So we will make that clear and substitute the words "with no costs."

MR. MOON: I will say, with all honesty, that under your rules, if you say nothing about costs, we then are not entitled to them.

I wanted to specifically bring them to the Court's attention.

(Tr-12)

MR. SANDERS: Might I approach the bench?

JUDGE O'SULLIVAN: Yes.

MR. SANDERS: We realize that the Court has taken the matters herein presented under full consideration and the Court has entered an order now, but we do intend to appeal this decision and we were wondering how soon we could have the Court's memorandum in support of its decision?

JUDGE O'SULLIVAN: It probably will be in your hands this week.

MR. SANDERS: Thank you, your Honor.

JUDGE O'SULLIVAN: The Court will stand adjourned.

(End of hearing.)

(Tr-13)

COURT REPORTER'S CERTIFICATE

I, Carl J. Pitt, do hereby certify that I, by means of a stenomask, reported the foregoing proceedings in Civil Action No. 24000, entitled FAIR DRAIN TAXATION, INC., et al v. CITY OF ST. CLAIR SHORES, et al, before the Honorable Clifford O'Sullivan, Circuit Judge, Honorable Theodore Levin, Chief District Judge, and Honorable Thaddeus M. Machrowicz, District Judge, sitting en banc, at Detroit, Michigan, on July 9, 1963; that the foregoing and attached twelve (12) typewritten pages are a true and correct transcript of that portion of my records then and there made of said proceedings.

Carl J. Pitt
Official U.S. Court Reporter
739 Federal Building
Detroit 26, Michigan
WOodward 1-9177

Dated: July 30, 1963.

Office-Supreme Court, U.S.
FILED
SEP 9 1963
JOHN F. DAVIS, CLERK

No. 604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FAIR DRAIN TAXATION, INC.,
a non-profit Michigan Corporation, et al.,
Appellants,

— vs. —

CITY OF ST. CLAIR SHORES,
a Michigan Municipal Corporation, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

WILSON M. JACKSON, and
WILLIAM L. SANDERS,
Attorneys for Appellants,
Suite 332 Eastland Center
Professional Building
Harper Woods 36, Michigan
Telephone: 371-5111

RAYMOND M. JACOBSON
Attorney for Appellants
Federal Bar Building
1815 H. Street, N.W.
Washington 6, D. C.

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INDEX

	Page
(A) Arguments as to Points Raised by Appellees In Their Motion to Dismiss	1
(B) Conclusion	20
(C) Citations	i
(D) Cases:	
16 CJS 293, Constitutional Law #92	2
Michigan Carolene Products Co. v. *Thompson*, 267NW 608, 276 Michigan 172	2
O'Neil v. *The United States*, in the Circuit Court of Appeals for Tennessee, 149 Federal 2d 908	4
Yakus v. *The United States*, in Mass., 64 S. Ct. 660	4
Osius v. *City of St. Clair Shores*, cited in 75NW 2d 25, 344 Michigan 693, 58 ALR, 2d 1079	4
Deveraux v. *Township Board of Genessee Township*, 211 Michigan 38, 177NW 967	5
White Brothers, Inc. v. *The City of Grand Rapids*, 260 Michigan 447, 45NW 509	5
Butterfield v. *Zydok*, 72 Supreme Court 1069, 343, U. S. 988	6
Redmond and Company v. The Michigan Securities Commission, 192NW 688	6
Morisette v. *The Board of Plumbing Examiners and Registration of Alabama*, 29 Southern 2d 333	6-7
Lee v. *Delmar*, 66 Southern 2d 252	7
Routt v. *Barrett*, 71NW 2d 660	7
Neuweiler v. *Kauer*, 107NW 2d 779	7
Moore v. *Harrison*, 244 Michigan 512	8
Holland v. *Clerk of Garden City*, 299 Mich. 465	8
Oakland County Drain Commissioner v. *City of Royal Oak*, 306 Michigan 124, 10NW 2d 435	8
Fitch Drain No. 129, 346 Michigan 639, 78NW 2d 600	9

	Page
Connor v. *Herrick*, 349 Michigan 201, 84NW 2d 427 decided July 31, 1967	9
Black Marsh Drainage District v. *Rowe*, 350 Michigan, 470, decided December 27, 1957	10
Township of Southfield v. *The Drainage Board for the Twelve Towns' Relief Drains*, 357 Michigan 49, 97NW 2d 821	12-13
City of Madison Heights v. *The Twelve Towns' Relief Drains Drainage Board*, 361 Michigan 522 (Cert. Den. 366 U. S. 919), 106NW 2d 126, decided December 1, 1960	13
International Salt Company v. *Herrick*, 367 Michigan 160, 116NW 2d 328, decided July 28, 1962	14
Petitions of Macomb County Drain Commissioner, 369 Michigan 641, 120NW 2d 789; M.T.A. 7-8	15
Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 70 Supreme Court, 652, 94 L. E. 865	18
Walker v. *The City of Hutchinson*, 352 U. S. 112, 77 Supreme Court 200, 1 L. E. 8d, 178. (J. S. 23-par. 14 of Amended Complaint.)	18

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

(A)

ARGUMENT AS TO POINTS RAISED BY APPELLEES IN THEIR MOTION TO DISMISS

I

In the first paragraph of their arguments, (M.T.A. 4) the Appellees avoid the fact by stating that the only question presented is:

> "Whether or not the Michigan Legislature acted wisely in enacting this Drain Legislation."

It is not the wisdom of the Michigan Legislature that is being attack, but:

> "Whether or not the Legislature did infringe upon valid constitutional rights of the Appellants in the enactment of this particular Drain Legislation."

The subject of constitutionality of legislative enactments is a valid subject of judicial review.

The final authority in determining whether or not the Legislature, in enacting a Statute, acted within its constitutional authority is vested in the Judiciary, and, in a proper case, it is the duty of the Courts to declare an unconstitutional Statute void, notwithstanding it has long been treated as constitutional; but such power is exercised with caution, and a Statute should be upheld if it is reasonably possible to do so. (See 16 CJS 293, Constitutional Law #92 and the footnotes thereunder on footnote 1 quoting every Jurisdiction in the United States, including *Michigan Carolene Products* v. *Thomson*, 267 N.W. 608, 276 Michigan 172.)

II

Appellants agree with Appellee's statement that Appellants say that the Legislature, in this Drain Act, give the public corporations too much power; in fact, they go much further and state, as they have stated in the District Court, (J.S. 26, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38) that the Legislature unconstitutionaliy delegated to the public corporations and in particular these drainage boards too much power. Counsel for Plaintiffs stated to the District Court that this excessive delegation of quasi-judicial and quasi-legislative powers to the drainage districts were unconstitutional as a denial of due process of law to the Plain-

tiffs and that the Legislature could find a valid constitutional method of accomplishing their purpose.

III

It is well settled in American Law that the functions of legislation or the judiciary, may not be delegated by the Legislature to the executive department or to any executive or administrative officer, board, or commission, except as such delegation may be expressly authorized by a Constitutional Provision. The Michigan Constitution, Articles 4, Sections 1 and 2, entitled, "DIVISION OF THE POWERS OF GOVERNMENT", reads as follows:

> "DEPARTMENTS OF GOVERNMENT. Section 1. The powers of government are divided into three departments: The Legislature, Executive, and Judicial."
>
> "LIMITATIONS OF POWERS OF OFFICERS. Section 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this Constitution."

By these provisions the Michigan Constitution affords the measure of the powers which may be granted to purely administrative boards or officers. Hence, where executive officers or bodies are charged with administration of Statutes, the Legislature must prescribe a policy, a standard or a rule for their guidance, and must not vest them with an arbitrary or uncontrolled discretion with respect to the matters or persons to which the Statute shall be applied. (See CJS, Volume 16, Section 138, on Pages 572, 573, 574, and cases cited therein.)

Whether a particular power may be delegated to administrative offices depends on the substance of the power to be delegated and not the number of acts which may be

performed thereunder. *It has been held, however, that a delegation of powers to executive offices should be made only under circumstances which allow complete recourse to the Courts.*

Executive agencies cannot, of course, be empowered by the Legislature to exercise power which the Legislature itself does not possess. (Footnote 26 under Section 138, on Page 580, citing therein the *State Board of Agriculture* v. *The State Administrative Board*, 226 Michigan 417, Volume 16, CJS.)

The Legislature may delegate to executive officers or bodies the power to determine certain facts or conditions or the happening of contingencies on which the operation of the Statute is, by its terms, made to depend, but the Legislature must prescribe *sufficient standards, policies or limitations on their control.* (Volume 16 CJS, Section 138, Footnotes 37 and 38; *O'Neil* v. *The United States*, in the Circuit Court of Appeals for Tennessee, 140 Federal 2d 908; U. S. Case of *Yakus* v. *United States*, in Mass., 64 S. Ct. 660, and including therein the landmark Michigan Case of *Osius* v. *City of St. Clair Shores*, cited in 75NW 2d 25, 344 Michigan 693, 58 ALR, 2d 1079.

In the *Osius* case the problem was put by Mr. Justice Smith as follows:

> "The problem that the Plaintiffs complain primarily about is that the Zoning Board of Appeals is exercising by delegation, a legislative function, which they condemn as unconstitutional, and that this delegative legislative function is exercised without guide or standard."

On top of Page 27, Mr. Justice Smith continues with the law on the subject:

> "There is no doubt that a legislative body may not delegate to another its law making powers. It must

promulgate not abdicate. This is not to say, however, that a subordinate body or official may not be clothed with the authority to say when the law shall operate, or as to whom, or upon what standard, or upon what occasion, provided, however, that the standards prescribed for guidance are as reasonably precise as the subject matter requires or permits. As we said in *Deveraux* v. *Township Board of Genessee Township*, 211 Michigan 38, 177 NW 967."

"The Statute in question provides no method for the application for licenses, contains no qualifications which the applicant must possess, provides no standard of fitness, makes no provisions as to the character of the structure or equipment to be used in the business regulated. It, in fact, attempts to confer upon the township board the arbitrary power to grant or refuse a license, according to its whim or caprice. Under all the authorities, we think this cannot be done."

The Court in the same case, gives even a more narrow definition or example that would apply to this case when it at the bottom of Page 27 said:

In *White Brothers, Inc.* v. *The City of Grand Rapids*, 260 Michigan 447, 45NW 509, the Ordinance involved provided:

> Section 6. Whenever it shall appear to the City Manager from such investigation and report that the charity is a worthy one and that the person or persons making the application are fit and responsible parties, he shall issue a permit to such person, firm, corporation or society."

With reference to which Mr. Justice North speaking for the Court said as follows:

> "The ordinance contains no rules or provisions by which the City Manager is to determine whether the charity is worthy or the applicant is fit or responsible. In making his determination he may apply more and more of a great variety of qualifications which to

> the City Manager may seem proper, or he may grant or refuse the permit solely on capricious grounds, and he may apply one test to one applicant and another to another. The ordinance does not contain the slightest indication of the kind of charity or character of charity that is a 'worthy one'; and likewise it is wholly silent as to what type of qualifications would constitute an applicant for a permit 'fit and responsible'. We see no escape from the conclusion that the ordinance attempts to vest the City Manager with an arbitrary power in the exercise of which he will say to one applicant, 'yes', and to another, 'no'."

In determining whether there has been an unconstitutional delegation of Legislative power, the entire Act is to be examined; the meaning of words determined by their surroundings and connection (*Butterfield* v. *Zydok*, 72 Supreme Court 1069, 343, U. S. 988).

The State may delegate police powers to subordinate agencies but such powers belong to the State and can be exercised by agencies of the State only under delegation of authority. Although it has been said that an Agency of the State can exercise police powers only when such power has been clearly or expressly delegated to it, it has also been held that a delegation of such power will be implied when necessary to carry forward an enterprise of public interest and general welfare. The extent to which the power may be delegated is a subject of great difficulty. *An attempted delegation may be held illegal on constitutional grounds.* The police power if delegated, must define its purpose *in the means of attainment thereof, in language leaving no wide administrative discretion and no discretion at all in legislative matters.* (See 16 CJS, Page 909 and 910 citing under footnote 40 thereof: *Redmond and Company* v. *The Michigan Securities Commission*, 192 NW 688; *Morisette* v. *The*

Board of Plumbing Examiners and Registration of Alabama, 29 Southern 2d 333; *Lee* v. *Delmar*, 66 Southern 2d 252; *Routt* v. *Barrett*, 71NW 2d 660; and *Neuweiler* v. *Kauer*, 107NW 2d 779).

In paragraphs 26 through 32 of the Amended Complaint in this cause (J.S. 29-34, inc.), Sections of Chapter 20 are assailed as unconstitutional as a denial of due process of law in that they are arbitrary, confiscatory and an unconstitutional delegation of judicial or legislative powers to an administrative board without any safeguards, controls or guides, or standards to aid the board in arriving at its various determinations. Reference to these paragraphs and the attached various sections, are hereby adopted in total by reference, stating that within the law, as above cited, Chapter 20 wholly fails to meet the constitutional test and does, in fact, deny due process of law being an unconstitutional delegation of judicial and legislative powers, in violation of the doctrine of separation of powers as enumerated in the Articles 1, 2 and 3, and Sections 1 thereof, of the United States Constitution and of Article IV, Sections 1 and 2 of the Constitution of the State of Michigan for 1908.

IV

The fourth allegation of the Defendants in the middle of page five of the Motion to Affirm, is that Plaintiffs in effect do not state a cause of action and only state a number of generalities and various claims of constitutional violation in the form of legal conclusions. This, of course, the Plaintiffs deny, and state that their actual position and cause for action is in the Complaint. It is well settled in American Law that a Motion to Dismiss a pleading or a Motion that attacks a pleading admits, for the purposes of the Motion, the truth of all facts well pleaded in the pleading attacked

and any inferences fairly deducible therefrom. (871 CJS, pages 906 to 910 and citations thereunder.) As to the validity of the challenges on unconstitutionality raised in Plaintiffs' Complaint and the manner of their raising one must look to the Complaint (J.S. 19-52; 7-12). Careful examination of the Amended Complaint in this matter will give the lie to the position of the Defendants.

V

The next reason for affirmance on the part of the Defendants is that all the constitutional questions raised by Plaintiffs have already been decided by the Michigan Supreme Court previously. (M.T.A. 6). Plaintiffs and Appellants deny this. Following is a case by case breakdown of the Michigan cases cited by Defendants and Appellees.

a. *Moore* v. *Harrison*, 224, Michigan 512; *Holland* v. *Clerk of Garden City*, 299 Michigan 465: These cases were decided many years previous to the enactment of Chapter 20 and have no bearing or relationship to Chapter 20, since the language contained in these cases is in no way similar to that of Chapter 20.

b. *Oakland County Drain Commissioner* v. *City of Royal Oak*, 306 Michigan 124, 10 NW 2d 435: This case, decided on June 30, 1943, concerned a fifty (50) year contract whereby the City granted the County the right to construct and maintain a connecting sewer, in a certain street, in connection with a contract between the City and County for disposal of sewage in the County through the City's sewage treatment plant. The questions of law decided were the following:

> 1. Legislature has power to ratify ultra-vires contract entered into by municipal corporations for public purposes, thus ratifying the contract.

2. The County in establishing proposed sewage disposal system would be performing an authorized function in respect to public health, and the expenditure of money in the establishment of such system is not in violation of the constitutional prohibition against States loaning its credit in aid of any person, association or corporation.

3. Financing for the system being paid by grants from the Federal Government and by the issuance of county revenue bonds, the bond issue was not an "obligation" of political subdivisions such as cities and towns of the county within the debt limitation provisions of the Statute and Constitution. The explanation being that it was a county debt rather than the debt of the municipalities involved.

This case, like the two above, was decided many years previous to Chopter 20 of the Drain Code of Michigan of 1956.

c. In Re: *Fitch Drain No. 129*, 346 Michigan 639, 78NW 2d 600: This case, decided October 1, 1956, seems to be concerned with whether land owners, under a Petition for the establishment of a county drain, under an Act entirely different from Chapter 20 of the Drain Code of 1956, had sufficient notice; the Supreme Court at that time, holding that posting in five (5) public places was personal service on the landowners so as to inform them of the nature of the proceedings were legal, and the fact that two of the landowners in fact, were not personally served by the notices handed to their husbands, who handed it to them, was merely a technical defect, and that these technical defects should be raised and decided before subsequent and expensive steps are taken. This case, like the others; had nothing whatsoever to do with Chapter 20 of the Drain Code of the State of Michigan of 1956.

d. and e. *Connor* v. *Herrick*, 349 Michigan 201, 84NW

2d 427, decided July 31, 1957, and *Black Marsh Drainage District* v. *Rowe*, 350 Michigan 470, decided December 24, 1957. The *Connor* case is the first to go to the Michigan Supreme Court for construction of Chapter 20 of the 1956 Michigan Drain Code. An evenly divided Court determined that Mandamus should issue compelling the Defendant Chairman of the Drainage Board to execute a contract on this Chapter 20 drain. Mr. Justice Black, one of the Dissenting four Justices, characterized the matter as a:

> "non-adversary proceeding with questions raised solely to assist immediate sales of municipal bond products."

and further characterized the proceedings in this case as:

> "these 'friendly lawsuits', where public officials get together for submission to a Court of selected issues concerning which there is little or no disagreement amongst them, undoubtedly are begotten of need for immediate adjudication of validity of the legal proceedings by which required public improvements are usually financed. The good faith of such officials, when they proceed in that manner can hardly be questioned. Nevertheless, in however praise-worthy their energetic effort to get at the job of improvement may be, *we have no right at their instance to countenance or encourage elimination of the occasionally tedious requirements of due process.*
>
> It is no answer to say that our Writ, if issued in this case, will be binding only as to the parties before the Court, and that presently absent taxpayers in municipalities of all three counties will remain free to justifiably question of validity of proceedings taken in pursuance of said Chapter 20. I think we should face with candor the realities of the situation that would obtain, once we signify favorable answer to the posed question and the bonds required to finance this and the related drain proj-

> ects are sold. *What juridical chance would any taxpayer have of overcoming the established fact of actual investment and going construction involving millions?"*

However, in the *Connor* case Mr. Justice Carr, deciding in favor of Mandamus, stated several propositions of law regarding Chapter 20 that later, without any further elucidation by the Court, were adopted in the following words in the *Black Marsh* case:

> "The questions raised in this cause have been fully answered in the opinion of Mr. Justice Carr, in the case of *Conner* v. *Herrick*, 349 Michigan 21, 84NW 2d 427, to which reference is made and adopted as a part of this opinion."

The points made by Mr. Justice Carr, adopted in *Black Marsh*, are the following:

1. Provisions of Chapter 20 of the Drain Code of 1956 do not contravene constitutional provisions to the effect that the credit of the State shall not be granted to, nor in aid of any person, association or corporation, public or private, and that no city or village shall have power to loan its credit, nor to assess, levy or collect any tax or assessment for other than a public purpose inasmuch as protection of public health was a public purpose and within the functions of government, under police power.

2. The provisions of the Drain Code, authorizing creation of intra-county drains and authorizing assessments at large against public corporations and levy of ad valorem taxes were proper exercises of police power of the State, designed in their operation to protect and promote public health, and the provisions did not contravene home rule provisions of the Michigan constitution of 1908, being Article 8, Sections 20 and 21, reading as follows:

> "The Legislature shall provide by a general law

for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing and contracting debts."

Section 21. "Under such general law, the electors of each city and village shall have power and authority to frame, adopt, and amend its Charter, and to amend an existing Charter of the city or village heretofore granted or passed by the Legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this State."

3. The provisions of the Drain Code authorizing drain assessment at large against public corporations which is to be paid by ad valorem taxation although the drainage area does not include the entire area of the public corporation, does not take property without due process as to those taxpayers whose lands are not in the drainage area to be served.

4. Protection of public health is a matter of governmental concern and within the scope of police power.

5. The expressed limitation on power of the State under constitutional provision that the credit of the State shall not be granted to, nor in aid of any person, association or corporation, public or private, applies with equal force to municipalities of the State.

6. In proceedings by drainage districts and others against taxpayers, and others for declaratory decree, the drainage project was necessary, evidence sustained drainage boards' finding was necessary for the benefit of the public health and the citizens of the community.

f. Township of Southfield v. *The Drainage Board for the*

Twelve Towns' Relief Drains, 357, Michigan 59, 97 NW 2d 821: This case, decided July 13, 1959, was brought by various municipal corporations in Oakland County, Michigan against Drainage Boards created under the same Chapter 20 (J. S. 63-80), and decided:

1. Townships are not municipal corporations within the meaning, purpose, spirit or intent of the fifteen (15) mill State constitutional limitations providing that such limitation may be increased when provided for by a municipal corporate charter, and therefore the Drain Code did not operate to increase the fifteen (15) mill tax limitation of such Townships since the taxing power of the townships was what they might receive from allocation of the fifteen (15) mills, plus any increase voted by its electors and any participation by the townships in the drains had to be so limited.

2. The rest of the points involved in this case have strictly to do with the rights of the public corporations as such as against the drainage boards and in no wise was any decision made effecting the individual rights of freeholders and taxpayers.

g. *City of Madison Heights* v. *The Twelve Towns' Relief Drains Drainage Board*, 361 Michigan 522 (Cert. Den 366 U. S. 919), 106NW 2d, 126, decided December 1, 1960: This case decided only that after prior suit has been instituted to determine the legality of the formula arrived at by the Drainage Board for apportionment, and a portion of one township was severed and incorporated into a city, and the city thus formed allowed to intervene in the suits, although the city filed no pleadings therein, and where the Attorney for the city in open Court stated that although he would not be present at all times, he had no objection to the trial proceeding in his absence, and where the suits resulted in a

determination that the formula was not in abuse of the board's discretion and the determination was not appealed, the city was not entitled to a second opportunity to challenge the legality of the formula which then became res adjudicata.

h. *International Salt Company* v. *Herrick*, 367 Michigan 160, 116NW 2d 328, decided July 28, 1962: This case was not brought under Chapter 20, but under other sections of the Drain Code and decided the following:

1. Where the Drain Code provided for notice to be mailed to each property owner whose name appeared on the assessment role, together with his address, it constituted due process (Note: Chapter 20 does *not provide* for mailing to each property owner).

2. The provision of the Drain Code, providing for service by publication in newspapers and by posting is not sufficient as a matter of law to afford reasonable notice as required by due process.

3. The provision of the Drain Code that failure to send notice by mail shall not constitute a jurisdictional defect in validating a tax, if notice shall have been published and posted is *at variance* with requirements of the Statute directing mailing of notice to each taxpayer entitled thereto, and is *invalid*.

4. The presumption of regularity of official action must yield, in order to constitute due process of law, to a showing as to the actual facts.

5. The provision of the Drain Code giving conclusive effect to the Affidavit of the Drain Commissioner is invalid as a denial of due process.

6. Section 280.154 of the Michigan Compiled Law Supplement of 1956 (*not* any part of Chapter 20) with the exception of provisions providing for notice by publication and

posting and giving conclusive effect to the Affidavit of drain commissioner, is constitutional on ground that its conditions therein prescribed are complied with, due process of law is had.

7. DUE PROCESS OF LAW DEMANDS THAT THERE BE A MAILING WHICH IS A REASONABLE METHOD CALCULATED TO GIVE NOTICE OF HEARING AND IT IS ONLY MEANINGFUL IF THE ACT OF MAILING IS PERFORMED.

8. Where there was absence of proof that any notice of hearing on assessments under Drain Code was mailed to property owner, such owner was entitled to equitable relief, and hence the case would be remanded with directions that drain commissioner afford such owner right to hearing relating to assessment against owners property.

i. In Re: *Petition of Macomb County Drain Commissioner*, 369 Michigan 641, 120 NW 2d 789, M. T. A. 7-8): This case involves solely the question of whether or not the State Highway Department, one of the public corporations to be assessed under a Chapter 20 drain, had the drain assessed fairly against it in proportion to the other public corporations. No constitutional questions as to the validity of Chapter 20 were raised or decided in this case. The question solely was upon the fairness of the assessment as to the State Highway Department, based upon some formula used by this Defendant Drainage Board in its determinations. The lengthy quotation appearing on page seven of the Motion to Affirm from this case has nothing whatsoever to do with the constitutional questions involved herein, but merely discusses certain proceedings under Chapter 20. The implication that the Supreme Court of Michigan,

"has clearly decided that the delegation of legis-

> lative, administrative and judicial powers to the Defendant Drainage District and their Drainage Boards is constitutional under the Constitution of Michigan and the due process of law and equal protection of the law clauses thereof." (M.T.A. 8)

is completely false and misleading. The Supreme Court of Michigan has decided no such matter.

In fact, Appellants have gone to lengths in this Brief to expound upon decided cases of Appellees for the sole purpose of impressing upon this Court as does not seem to have been impressed upon the lower Court that by citing these cases the Appellees are misleading and misguiding this Court and giving completely contrary views of the actual decided cases. *There is no case in Michigan THAT HAS DECIDED THE CONSTITUTIONAL QUESTIONS RAISED BY THE AMENDED COMPLAINT OF THE APPELLANTS HEREIN. IF THE DISTRICT COURT BELOW HAD BEEN ABLE, AWAY FROM PRESSURE EXERTED BY THE APPELLEES HEREIN, TO GIVE DUE AND FAIR CONSIDERATION TO THESE CASES IN THE LIGHT OF THE AMENDED COMPLAINT FILED BY THE APPELLANTS, THEY WOULD HAVE COME TO THE SAME CONCLUSION AS IS HEREIN STATED: THE CONSTITUTIONAL QUESTIONS RAISED BY THE APPELLANTS IN THE AMENDED COMPLAINT HAVE NOT BEEN DECIDED BY THE SUPREME COURT OF THE STATE OF MICHIGAN IN ANY OF ITS DECISIONS.* That the District Court did not give due deliberation to this matter, can be seen from the statement of the Honorable Clifford O'Sullivan (M. T. A., page 30, the last sentence therein).:

> "Firstly, we wish that we could have more time for our contemplative consideration of the legal points involved, but we think, this being a matter

> of great public concern, in fact, it involves the health of the persons who will be affected by what we do, and therefore we cannot give ourselves that opportunity to more quietly and leisurely consider the legal questions. It is a matter of such emergency nature that prompt decision of it should be made."

That the Lower Court relied upon these improper interpretations of the law is apparent from the opinion of the District Court filed in this matter on July 16, 1963, appearing on pages 54 and 55 of the Jurisdictional Statement, wherein the Court said, in the second paragraph thereof:

> "It may be said at the outset that litigation with respect to practically all the issues in this action have been before various Courts of the State of Michigan immediately following the enactment of this legislation and continues to this day. As early as 1957, in *Conner* v. *Herrick*, 349 Mich. 201, and *Black Marsh Drainage District* v. *Rowe*, 350 Mich. 470, the Supreme Court of Michigan dealt with many of the issues presented here. See also subsequent opinion of the Court of last resort of Michigan, *Township of Southfield* v. *Drainage Board for Twelve Towns' Relief Drains*, 357 Mich. 59 (1959); *City of Madison Heights* v. *The Twelve Towns' Relief Drains Drainage Board*, 361 Mich. 322 (1960); in re: *Petition of Macomb County Drain Commissioner*, 369 Mich. 641 (April 5, 1963)."

Of the cases cited by the Appellees on page 6 of their Motion to Affirm and which have been heretofore delineated herein, the case of *International Salt Company* v. *Herrick*, 367 Mich. 160 is the only one that has any applicability to the constitutional questions raised in the Amended Complaint by Appellants and, far from sustaining the view of the Appellees, this case is four-square with the constitutional proposition enunciated by the Appellants that Chapter 20 does not afford these freeholders and taxpayers who

are entitled to notice, such notice as would reasonably calculate to inform the parties of proceedings which may directly and adversely affect their legally protected interests. (See *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 Supreme Court, 652, 94 L.E. 865; *Walker* v. *The City of Hutchinson*, 352 U.S. 112 77 Supreme Court 200, 1 L.E. 2nd, 178), (J.S. 23—par. 14 of Amended Complaint).

The constitutional issues by which Plaintiffs challenged Chapter 20 are those summarized in the statement of the case in the Jurisdictional Statement (J.S. 9 and 10), and no others.

Appellants are not urging the Federal Courts to adopt a statutory construction opposed to that adopted by a State Court. Appellants seek rightly to have decided constitutional questions of great import and effect on themselves.

VI

The objections stated by the Appellees, beginning with the second paragraph on page nine of the Motion to Affirm that the only questions presented before the lower Court were questions numbered five through 12 is disputed by the facts. On July 23, 1963, the Appellants filed their MOTION FOR CLARIFICATION OF THE COURT'S DETERMINATION, (J.S. 81-86). Wherein the matters raised by questions one and two or the Jurisdictional Statement (J.S. 3-4) are brought to the lower Court's decision, which was forthcoming on August 5, 1963, entitled "SUPPLEMENTAL OPINION" (J.S. 87-88). It is to be noted that in paragraph seven of the MOTION FOR CLARIFICATION OF THE COURT'S DETERMINATION (J.S. 85-86), Appellants recited to the District Court that they were preparing to take further action to seek the relief to which they felt

they were entitled, but were unable to do so because of what seemed to be contradictory positions of the Court. These contradictory positions are precisely what are challenged in questions one, two and three of the questions presented by this Appeal (J.S. 3-4). The confusion existing in Appellants mind because of this seemingly contradictory position as reflected by Judge O'Sullivan's pronouncement in open Court (M.T.A. 31; J.S. 85). On July 9, 1963:

> "We find that both the original and the Amended Complaint before us do not, either of them, state a cause of action, within the *jurisdiction* of this Court, nor do they state a cause of action."

and the formal judgment entered July 9, 1963 (J.S. 90),

> "It is hereby further ordered, adjudged and decreed, that the said Complaint and Amended Complaint be, and the same are hereby dismissed for failure to to state a claim upon which relief can be granted, with prejudice and with no costs."

and the opinion of the Court as filed July 16, 1963, (J.S. 54-62) as to question four, it is valid for the simple reason that Plaintiffs were not allowed the ten days time to answer the new matter raised by Plaintiffs in their MOTION TO DISMISS, which had not previously been before the consideration of the Court, and the rules stated in question four (J.S. 4) do require that ten days be given where new matter was introduced by way of Motion and this new matter was presented in Appellees (then Defendants) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (M.T.A. 15-21) In paragraphs A (M.T.A.), C (M.T.A. 16), G (M.T.A. 18-19), J (paragraphs 19 and 20), L (M.T.A. 20), and N (M.T.A. 21). All of these paragraphs brought out additional or new matters not within the scope or province of the Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Found, but

were based in part on matters that could be determined outside of the original or Amended Bills of Complaint.

All of the questions presented on this Appeal are substantial and merit the earnest consideration of this Court.

(B)
CONCLUSION

None of the Appellees' arguments in the Motion to Affirm (M.T.A. 4-11) can be sustained, as can be seen by the foregoing arguments. The position of the Appellees is untenable for the reason that it is predicated upon misinterpretation, misstatement and misleading evaluation of the decided cases of this state and of Federal decisions as it pertains to the constitutional question raised by the Complaint and the Amended Complaint heretofore referred ot in this matter. The Lower Court was stampeded into an ill-advised and ill-considered conclusion predicated upon an assumption of great urgency, which assumption was not borne out by fact nor or could it properly be considered upon a Motion to Dismiss. The questions raised are basic, elementary and yet of such magnitude and importance that an improper or improvident decision as heretofore rendered by the District Court cannot be allowed to stand, for such a conclusion would constitute a travesty of justice that would ultimately lead to taking of property without due process of law due to the res adjudicata effect of the improperly rendered decision. Accordingly, the Appellants urge this honorable Court to seriously consider the momentous questions raised in this Appeal and to determine these questions in light of the body of constitutional law existing which by its very nature, must hold the decision of the Lower Court must be reversed and the constitutional question raised in the Complaint and Amended Complaint determined in favor of the Appellants.